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No. 89-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

BYWATER NEIGHBORHOOD ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
CRESCENT CITY COMMUNICATIONS COMPANY,
INC. OF DELAWARE, AND NOTEL, INC.,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does the Hobbs Act preclude a federal district court from exercising jurisdiction over actions against the Federal Communications Commission to enforce the National Historic Preservation Act and the National Environmental Policy Act until after the FCC has granted an operating license for a television microwave tower, at which time the environmental damage — construction of the tower — will have already occurred?

(2) Did the Fifth Circuit err in holding that non-federal entities acting under authority of a federal license could not be joined in an action to enforce the National Environmental Policy Act and the National Historic Preservation Act, even though joinder is necessary to provide complete relief?

PARTIES TO THE PROCEEDING

The parties are:

Petitioner:

Bywater Neighborhood Association*

Respondents:

The Federal Communications Commission, William J. Tricarico, in his capacity as Secretary, Federal Communications Commission, Crescent City Communications Company, Inc. of Delaware, and Notel, Inc.

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*As required by Rule 28.1 of this Court, Petitioner states that it has no parent companies, subsidiaries, or affiliates.

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v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
CRESCENT CITY COMMUNICATIONS COMPANY,
INC. OF DELAWARE, AND NOTEL, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bywater Neighborhood Association hereby petitions this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 8, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 879 F.2d 165 (5th Cir. 1989), and

is reprinted in the Appendix, at 1a- 9a. The decision of the United States District Court for the Eastern District of Louisiana, which is not reported, is reprinted in the attached Appendix at 10a.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on August 8, 1989. An extension was granted by Justice White on November 6, 1989, extending the time within which a petition for certiorari must be filed to December 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND FEDERAL REGULATIONS INVOLVED

National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1982)

National Historic Preservation Act (NHPA), 16 U.S. §§ 470 *et seq.* (1982)

The Administrative Procedure Act, 5 U.S.C. § 703

The Administrative Orders Review Act, (The "Hobbs Act"), 28 U.S.C. § 2342 (1982)

36 C.F.R. Part 800 (1988) (Advisory Council on Historic Preservation regulations)

40 C.F.R. Part 1500 (1988) (Council on Environmental Quality regulations)

The statutory and federal regulatory provisions involved are reprinted in the Appendix, at 1a-28a.

STATEMENT OF THE CASE

This case presents the question of whether judicial review of the Federal Communications Commission's failure to comply with Section 106 of the National Historic Preservation Act ("NHPA" or "Section 106"), 16 U.S.C. § 470f (12a) and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (13a), prior to allowing the construction of a 200-foot television microwave tower must be deferred until after an operating licensing has been issued. Such a delay would deny any meaningful judicial review of the agency's compliance with these mandatory environmental and historic review obligations since the environmentally harmful impact — construction of the tower — will have already occurred. Because the Fifth Circuit's decision conflicts with the decision of the Third Circuit in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 1980), *cert. denied sub nom., General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981), review by this Court is necessary to clarify this unsettled issue.

A. Statutory Background

NEPA and the NHPA impose mandatory requirements on federal agencies to consider the effects of their actions on historic and cultural resources before taking or authorizing any proposed action that may affect these resources. As this Court recognized in *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989), these statutory environmental review obligations "ensure[ ] that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the

decisionmaking process and the implementation of that decision." *Id.* at 1845.[1]

While NEPA's requirements for preparing, circulating, and considering an environmental impact statement are well known, some additional background on the analogous requirements of the National Historic Preservation Act, which has never heretofore been reviewed by this Court, is warranted.

The National Historic Preservation Act was enacted by Congress in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. 16 U.S.C. §§ 470(b), 470-1. In order to promote this policy, Section 106 of the NHPA prohibits federal agencies from conducting any federal "undertaking" (including any federally assisted or licensed undertaking), unless the agency, in consultation with the State Historic Preservation Officer ("SHPO"),[2] (1) takes into account the effects (including no effect) of the undertaking on historic properties on or eligible for the National Register of Historic Places; and (2) affords the Advisory Council on Historic Preservation, an independent federal agency, a reasonable opportunity to comment on the undertaking. *Id.* § 470f.[3] This consultation process is a critical aspect of Section 106, and is required even when an agency determines that its actions will have no adverse effect

[1]NEPA requires the evaluation of impacts on historic and cultural resources as part of its broader requirement that agencies evaluate the environmental effects of their proposed major actions that significantly affect the environment. 42 U.S.C. § 1502.16(g).

[2]The SHPO is the official in each state responsible for assisting federal agencies in carrying out their historic preservation responsibilities in the Section 106 consultation process, 36 C.F.R. § 800.1(c).

[3]This review and consultation process, which is set out more fully in the regulations issued by the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, must be completed as early as possible in the decisionmaking process, and in any event prior to federal approval, licensing, or funding of the project. *Id.* § 800.3(c).

on historic properties, since the agencies with expertise in historic preservation — the SHPO and the Advisory Council — must concur in any such agency determination. 36 C.F.R. § 800.5(a)-(d); 800.8(a). If the impact on historic properties is adverse, the federal agency must then consider ways in which the adverse impact can be avoided or mitigated. *Id.*, § 800.5(e). Like NEPA, the responsibility for complying with these requirements rests, by the terms of the statute, solely with the agency. 16 U.S.C. § 470f.

There is no dispute that Section 106 and NEPA apply to the FCC's decision challenged herein.[4] Rather, the sole issue is whether judicial review of the FCC's failure to comply with these statutes is available before the environmentally harmful impacts to historic properties have already occurred.

Judicial review of agency compliance with NEPA is pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 703, which does not specify the court in which NEPA claims must be brought. Generally, enforcement of NEPA has been assumed to be within the subject-matter jurisdiction of the district courts. *E.g.*, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 782-83 (1976). The NHPA, on the other hand, expressly creates a private right of action outside the APA that authorizes "civil action[s] in any United States district court by any interested person to enforce the provisions of [the NHPA]." 16 U.S.C. § 470w-4; *see Vieux Carré Property Owners, Residents & Assoc's, Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989).

As the Fifth Circuit recognized, however, special rules apply where the agency charged with violating its environmental review obligations is an agency subject to the Administrative Orders Review Act, 28 U.S.C. § 2342 (the "Hobbs Act"). The Hobbs Act expressly provides that exclusive jurisdiction

[4] *See* Letter to Crescent City Communications from Alan Schneider, Chief Auxiliary Branch, FCC (December 8, 1988). (29a).

for review of final orders of several agencies, including the FCC, lies in the Court of Appeals. 28 U.S.C. § 2342(a); *see also* 47 U.S.C. § 402(a) (the Federal Communications Act). Thus, where a final order is challenged on the grounds that is was unlawfully issued, for whatever reason (including failure to comply with a statute, such as NEPA, for which an independent source of jurisdiction exists), that action must be brought in the court of appeals. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526-27 (1978).

However, when there has been no final agency action that is reviewable by the court of appeals, and where a NEPA violation is alleged to have occurred, the district court must have jurisdiction to order declaratory or injunctive relief if the agency violates a clear, non-discretionary duty under NEPA, and there is no other adequate remedy.[5] It is this crucial principle that the Fifth Circuit failed to follow in the decision below.

B. Factual Background

On June 22, 1988, Crescent City Communications of Delaware ("Crescent City") applied for a license from the Federal Communications Commission ("FCC") to broadcast from a 200-foot Studio Transmitter Link (STL) tower, for use in conjunction with a new television broadcast station, WCCL-TV, Channel 49 in New Orleans.[6] The tower was to be con-

[5]*See, e.g., Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (district court had jurisdiction over plaintiff's claim that the AEC failed to comply with NEPA prior to allowing interim operation of a nuclear power plant while the operating license was still pending); *City of Irving v. Federal Aviation Administration*, 539 F. Supp. 17, 34 (N.D. Tex. 1981) (claim that FAA failed to comply with NEPA was subject to review in district court when there was no order to review and the only claim was under NEPA). *See also Leedom v. Kyne*, 358 U.S. 184 (1958).

[6]An STL tower is a form of TV microwave station used by a broadcast station to send its signal from the studio to its transmitter for transmission to the general public. 47 C.F.R. § 74.601(b).

structed in the Bywater Historic District, which is listed in the National Register of Historic Places.[7]

Crescent City's application failed to disclose that the facilities were to be constructed within a historic district. To the contrary, Crescent City affirmatively represented in its application that the license would not be a "major action," despite the fact that the FCC's environmental regulations expressly define a "major action" to include "facilities that will affect districts, sites, buildings, structures or objects, . . . that are listed in the National Register of Historic Places or are eligible for listing." 47 C.F.R. § 1.1307(a)(4). As a result of this omission, no notice of the application was sent to the State Historic Preservation Officer, as is required by Section 106 of the NHPA, nor were interested members of the public, including the Bywater Neighborhood Association (the "Neighborhood Association"), put on notice of the licensing proceeding, with its attendant impacts on the historic district.[8]

The STL facility involved in this case is licensed pursuant to a "one-step" licensing process, under which the FCC has waived the requirement for a separate construction permit,

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[7]The Bywater Historic District was listed in the National Register of Historic Places on January 23, 1986. The Bywater district is located east of the historic Vieux Carre (French Quarter) along the Mississippi River in New Orleans. The residential and commercial buildings in the district date from 1807 to 1935. The architectural integrity of the district has remained substantially intact, with relatively few modern intrusions. Even the few modern buildings are no more than one or two stories tall.

[8]36 C.F.R. §§ 1.1307(a)(4); 1.1308. Likewise, the Council on Environmental Quality ("CEQ") regulations implementing NEPA require broad public notice of actions affecting the environment. *See* 40 C.F.R. §1506.6(b)(3) (agency should mail notice of action with primarily local effects to potentially interested community organizations and to state and area clearinghouses).

and an applicant files only an application for an operating license. 879 F.2d at 166 n.1 (2a). In the case of licenses which do not require a separate construction permit, the FCC's environmental regulations provide only that "environmental processing (if invoked) shall be completed before authorization of the facilities is granted." 47 C.F.R. § 1.1312.

On June 30, 1988, July 11, 1988, and November 1, 1988, the Advisory Council on Historic Preservation wrote to the FCC noting that the STL tower was to be constructed within the Bywater Historic District and reminding the agency of its obligations to comply with Section 106 prior to construction of the tower. (32a) Notwithstanding the Advisory Council's repeated requests, the FCC took no action, and construction of the tower was begun by the applicant. Accordingly, on November 16, 1988, the Neighborhood Association filed a complaint in the U.S. District Court for the Eastern District of Louisiana, seeking an injunction against further construction of the tower pending the FCC's compliance with Section 106 and NEPA.[9]

C. Proceedings Below

On December 8, 1988, the Neighborhood Association's complaint was dismissed by the district court on the ground that the D.C. Circuit had exclusive jurisdiction over appeals from FCC orders. The Fifth Circuit affirmed this holding on appeal, by opinion dated August 8, 1989. *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989).

The Fifth Circuit held that judicial review of the FCC's compliance with Section 106 and NEPA was premature until after

[9]The complaint also alleged that the FCC failed to comply with NEPA and Section 106 prior to issuing two other licenses, on May 20 and June 19, 1988, to construct and operate two satellite earth stations in the Bywater Historic District.

the FCC issued a final, appealable licensing order, even though the tower was already being constructed.[10] The Fifth Circuit also stated that the license applicants were improperly joined as defendants, reasoning that, as nonfederal entities, they would not, in any event, be subject to the NHPA, which imposes obligations only on federal agencies. 879 F.2d at 167 n.7 (3a).

Construction of the STL tower has now been completed, although the FCC has not yet issued an operating license for the tower, and has not yet evaluated the impact of the tower on the historic district or consulted with the State Historic Preservation Officer, as required by Section 106 and NEPA.[11]

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision That Judicial Review of An Agency's Failure to Comply With NEPA and Section 106 Is Not Available Until After the Agency Issues A Final Licensing Order Is Incorrect, and Is in Direct Conflict with the Third Circuit.

The FCC's own environmental regulations clearly require it to assess the impacts of the 200-foot STL tower on the Bywater Historic District, and to consult with the State

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[10] The Fifth Circuit also held that the Neighborhood Association must first exhaust its administrative remedies before it could seek judicial review of the FCC's failure to comply with NEPA and Section 106 in licensing the satellite earth stations, by filing a petition before the FCC to revoke the licenses. 879 F.2d at 169. This petition does not seek Supreme Court review of the Fifth Circuit's ruling with respect to the satellite earth stations.

[11] Final FCC action on the operating license fo the STL tower was deferred pending resolution of an objection asserted by the Neighborhood Association that compliance with NEPA and Section 106, albeit after-the-fact, is still required. (2a).

Historic Preservation Officer, in compliance with Section 106 and NEPA. 47 C.F.R. §§ 1.1307(a)(4); 1.1308; 1.1312. The FCC violated its plain, nondiscretionary duty to comply with Section 106 and NEPA by allowing construction of the STL tower to occur prior to complying with these mandatory environmental review statutes.[12] This failure fundamentally undermines the "action-forcing" purpose of these statutes by increasing the risk that an after-the-fact environmental review will not adequately inform the FCC's final licensing decision, "a risk that arises in part from the practical fact that bureaucratic decisionmakers . . . are less likely to tear down a nearly completed project than a barely started project." *Sierra Club v. Marsh*, 872 F.2d 497, 501 (1st Cir. 1989).[13]

Despite these clear, statutory violations, the Fifth Circuit held that the Neighborhood Association was foreclosed from seeking judicial review to prevent construction of the tower pending compliance with Section 106 and NEPA, on the grounds that the FCC had not yet issued a final "order." Under the Fifth Circuit's approach, judicial review would always be "premature" until the FCC issued its final licensing order, even though construction of the tower — and therefore the increased risk of harm to the historic district that NEPA and Section 106 are designed to prevent — would have already occurred. 879 F.2d at 169 (8a).

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[12]The FCC purports to justify its failure to comply with Section 106 prior to construction of the tower by asserting that it only licenses the operation, not the construction, of auxiliary broadcast stations, such as STL towers. However, this is contradicted by the FCC's own environmental regulations, which recognize that the primary environmental impact is the construction of the facility, not its operation. Thus, the FCC's regulations categorically exclude from the environmental review process the licensing of new antennas on existing buildings or towers. 47 C.F.R. §1.1306 n.1.

[13]*See* Part II, *infra*.

The Fifth Circuit's holding that judicial review of the Neighborhood Association's claims under NEPA and Section 106 was not available until after the FCC issued its final licensing order is in direct conflict with the decision of the Third Circuit in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom., General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981), involving a violation of NEPA under circumstances virtually identical to those here. In that case, the Third Circuit held that the district court had jurisdiction over an action alleging that the Nuclear Regulatory Commission ("NRC") had violated NEPA when it informally authorized the discharge of contaminated water by the owner of a nuclear power plant prior to complying with NEPA, notwithstanding the fact that the NRC's after-the-fact compliance with NEPA would become reviewable by the court of appeals when the NRC issued a final licensing order.[14]

The need for district court review is even more pronounced where, as here, review is sought of an agency's failure to comply with the consultation and review requirements of Section 106. As the Fifth Circuit specifically acknowledged, a "tension exists" between the commands of Section 106 and the special statutory review procedures of the Hobbs Act. 879 F.2d at 168. (6a) The assessment of the aesthetic and other impacts resulting from construction of a 200-foot tower on the architectural and cultural characteristics of the Bywater Historic District is clearly not a matter within the expertise of the FCC, and the FCC's assessment of these effects would not be entitled to any particular deference by the reviewing

[14]To further confuse matters, the D.C. Circuit has apparently adopted a third approach, which would allow citizens to obtain review while the license decision is pending, but would vest exclusive jurisdiction in the court of appeals. *See General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096, 1099 (1981) (Rehnquist, J., dissenting) (citing *City of Rochester v. Bond*, 603 F.2d 168, 936-37 (D.C. Cir. 1979)).

court. Rather, Section 106 mandates that this assessment take place in consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation, who are the true agency experts on these issues and whose views are subject to deference by the courts.[15] Moreover, these determinations are governed by the Advisory Council's objective regulatory criteria for assessing adverse effects, not by the FCC's regulations.[16]

In any event, it is critical that this Court resolve this split in the circuits, since this issue has widespread implications for other "Hobbs Act" agencies which have adopted "streamlined" or "expedited" licensing procedures that allow environmentally harmful actions to occur prior to compliance with Section 106 or NEPA.[17]

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[15]*See Preservation Coalition v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982); *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784, 791 (S.D. Ohio 1982).

[16]36 C.F.R. § 800.9. Likewise, the concern that *de novo* district court review would be duplicative of the agency's review does not apply where, as here, the agency has refused or failed to comply with Section 106 altogether. To the contrary, *de novo* judicial review is all the more essential where the question of the agency's compliance rests on factual matters such as the assessment of effects on historic properties and whether the agency has provided the proper notification of the SHPO and the Advisory Council. These are issues for which no administrative record would exist to enable appellate review.

[17]*See, e.g., Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663 (9th Cir. 1989), *petition for cert. filed sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 58 U.S.L.W. 3336 (U.S. Oct. 30, 1989) (No. 89-701) (Ninth Circuit held that it had no jurisdiction to review ICC order denying petition for reconsideration filed by preservation group claiming that ICC failed to comply with NEPA and Section 106 before it authorized the abandonment of a historic railroad under the ICC's abbreviated "exempt" abandonment procedures, 49 C.F.R. § 1152.50).

II. Resolution of This Case Is Important in Order to Ensure that NEPA and Section 106 Rights Are Preserved.

As was noted earlier, central to NEPA and Section 106 is the requirement that these mandatory environmental and historic impact reviews be conducted as early as possible in the licensing process, before environmentally harmful actions are taken, and while the widest feasible range of alternatives is open for consideration. 36 C.F.R. § 800.3(c); 40 C.F.R. §§ 1501.2; 1506.1. Indeed, the regulations of the Advisory Council on Historic Preservation expressly provide that completion of a project prior to seeking the Advisory Council's views forecloses the Council's opportunity to comment on the undertaking. 36 C.F.R. § 800.6(d).

The irreparable harm that results from such foreclosures is rooted in the simple logic that "it is far easier to influence an initial choice than to change a mind already made up." *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983). Completion of an environmentally harmful project prior to the evaluation of its impacts and alternatives undermines NEPA's core objective — minimizing the risk to the environment resulting from decisionmakers who are unaware of the environmental consequences of their actions. As the First Circuit explained in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989),

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, . . . ***NEPA's object is to minimize . . . the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers . . . are less likely to tear down a nearly completed project than a barely started project.***

Id. at 500-01 (emphasis added).

In recognition of the "action-forcing" nature of Section 106 and NEPA, the courts have not hesitated to enjoin agencies from authorizing environmentally harmful activities during the pendency of a licensing proceeding prior to compliance with NEPA. For example, in ***Susquehanna Valley Alliance***, the Third Circuit held that the NRC violated NEPA when it informally authorized the discharge into the Susquehanna River of contaminated water that had accumulated in the Three Mile Island nuclear reactor following the cold shutdown of the plant after the March, 1979 accident, on the ground, ***inter alia***, that the NRC had unlawfully authorized this discharge outside of the licensing process without first complying with NEPA. The court reasoned that

> by fragmentating [sic] its consideration the NRC postpones preparation of an impact statement until after private parties have been permitted to expend large sums on construction, the resulting change in the status quo has the almost inevitable effect of distorting the later view of both the agency and the reviewing court as to the desirability of the action in question.

Susquehanna, 619 F.2d at 240.[18]

The Fifth Circuit's decision, by precluding judicial review of NEPA and Section 106 violations until after the environmen-

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[18]*See also Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1127 (D.C. Cir. 1971) (AEC should not be permitted to foreclose alternative solutions by delaying environmental impact statements); *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (The district court enjoined interim operation of a nuclear power plant while the operating license application was still pending, because the AEC clearly violated its "nondiscretionary legal duty" to comply with NEPA prior to allowing this environmental impact to occur.)

tal harm has occurred, undermines these mandatory environmental review statutes. This Court's review is therefore needed in order to ensure that the right to meaningful enforcement of agency compliance with NEPA and Section 106 are not further eroded.

III. The Fifth Circuit's Ruling That the Court Lacked Jurisdiction Over the Non-Federal Defendants Creates a Split in the Circuits As to Whether Non-Federal License Applicants Can Be Joined As Defendants Where Joinder is Necessary to Enforce Compliance with NEPA and Section 106.

Relying on its earlier decision in *Vieux Carré Property Owners, Residents, & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-563), the Fifth Circuit stated that "were it possible for the Neighborhood Association to go forward with this action, the private defendants, Crescent City and Notel, would be dismissed." 879 F.2d at 167 n.7. (3a) This result is in direct conflict with the opinions of the Tenth and Ninth circuits in *Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988), and *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977), which upheld the joinder of non-federal defendants in lawsuits challenging federal agency action (or inaction) in permitting non-federal entities to go forward with environmentally harmful projects absent federal compliance with environmental laws.[19]

[19]Indeed, the courts have routinely and without question permitted the joinder of non-federal license applicants who are actually carrying out federally funded or licensed projects, where the federal agency has failed to comply with NEPA or Section 106, in recognition that joinder of the non-federal defendants in such cases was necessary to afford complete relief to the parties. *See, e.g., Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3d Cir. 1983) (non-federal defendants en-

The power of the federal government to impose reasonable conditions on the use of federal privileges has been characterized by this Court as "beyond challenge." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958). One such inherently reasonable condition is Section 106's mandate that agencies assess the impact of a project on historic resources before issuing any permit or license that will affect historic resources. As the Fifth Circuit earlier recognized in *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1027 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972), to allow nonfederal entities to proceed with federally-authorized projects where the federal agency has failed to comply with federal environmental protection laws "would be giving approval to the circumvention of an Act of Congress," thereby implicating "the fundamental principle" of "[t]he supremacy of federal laws." 446 F.2d at 1027. Unless courts have the power to enjoin nonfederal licensees, the mechanisms specifically designed by Congress for judicial enforcement of the NHPA, 16 U.S.C. § 470w-4, will be undermined.

Accordingly, because jurisdiction over the nonfederal entities is necessary to afford the Neighborhood Association com-

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joined pending HUD compliance with NHPA and NEPA); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (private timber cutting and mining company enjoined National Park Service's compliance with NEPA); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (S.D. Cal. 1985) (private developer enjoined pending Army Corps' compliance with NHPA and NEPA); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp 784 (S.D. Ohio 1982) (Court enjoined private land-owner from constructing a barge-loading facility near a historic site, due to the Army Corps' failure to comply with Section 106 prior to issuing a permit under Section 10 of the Rivers and Harbors Act); *Save the Courthouse Committee v. Lynn*, 408 F. Supp. 1323, 1344 (S.D..N.Y. 1975) (non-federal defendant enjoined from proceeding with urban renewal project due to HUD failure to comply with NHPA and NEPA).

plete relief, regardless of the forum in which the action must be brought, Supreme Court review is necessary to clarify this issue as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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December 6, 1989

BYWATER NEIGHBORHOOD ASSOCIATION,
Plaintiff-Appellant,

v.

William J. TRICARICO, in his capacity as Secretary, Federal Communications Commission, Crescent City Communications Company, Inc., of Delaware, and Notel, Inc.,
Defendants-Appellees.

No. 88-3901

Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1989.

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Bywater Neighborhood Association ("Bywater") seeks the removal of two structures it considers inconsistent with the character of its neighborhood, a national historic district. The two structures are a 200-foot television microwave tower, owned and built by Crescent City Communications Company, Inc. ("Crescent City"), and a satellite earth station, owned and built by Notel, Inc., a firm related to Crescent City. The Federal Communications Commission ("FCC"), together with local authorities, is the regulatory body with authority to issue

licenses for the operation of both facilities.[1] The FCC has already issued a license for the satellite earth facility, now constructed and operational. However, it has "deferred" action on the operating license for the television transmitter, although the tower itself has been built under the "one-step" licensing procedure.

The gravamen of Bywater's complaint is that the FCC failed to adhere to the dictates of the National Historic Preservation Act ("NHPA") and to its own regulations, which require it to consult with the NHPA Advisory Council with regard to the potential effect the structure might have upon the Bywater National Historic District. Bywater contends that the FCC's failure in this regard was, in part, the result of Crescent City and Notel's having withheld important facts concerning the area in which they were to build. Bywater brought this suit against the FCC, Crescent City, and Notel under the Administrative Procedure Act ("APA"),[2] the Declaratory Judgment Act,[3] the National Historic Preservation Act,[4] and the Mandamus and Venue Act.[5] The district court dismissed the suit for want of subject-matter jurisdiction. We affirm.

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[1]The FCC explains that it also requires a license for the construction of certain types of facilities. However, for both facilities at issue here, "streamlined" application processes were available: Notel was able to submit one application for both the construction and operation of the satellite earth station. For the television microwave tower, Crescent City took advantage of an available "one-step" process under which there is no requirement that the applicant receive a construction permit, although the applicant cannot operate the facility without a license. Applicants that, like Crescent City, use this procedure take the risk that the license will be denied and the structure thereby will become useless for transmitting purposes.

[2] 5 U.S.C. § 701 *et seq.*

[3]28 U.S.C. § 2201 *et seq.*

[4]16 U.S.C. § 470*et seq.*

[5]28 U.S.C. § 1361

I.

Bywater correctly observes that the NHPA expressly permits private suits outside the APA review process; it points to 16 U.S.C. § 470w-4, which provides that attorney's fees, expert witness fees, and other costs may be awarded.[6] In *Vieux Carre Property Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989), we held that section 470w-4 does in fact create a private right of action that can be brought by an interested person, but only against the agency, since the NHPA, by its terms, can be violated only by an agency.[7]

Bywater seeks to compel the FCC's compliance with the following NHPA provision:

> [T]he head of any Federal ... agency having authority to license any undertaking shall, ... prior to the issuance of any license, ... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

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[6]Section 470w-4 reads, in its entirety,

> In any civil action brought in any United States Court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

[7]Hence, were it possible for Bywater to go forward with this action, the private defendants, Crescent City and Notel, would be dismissed.

Here, however, it is the FCC which Bywater accuses of neglecting its NHPA duties, and in suits against that agency, special rules apply. Those rules are found in 28 U.S.C. § 2342[8] and 47 U.S.C. § 402(b),[9] which vest *exclusive* jurisdiction over appeals from the FCC's final orders in the respective circuit

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[8]Section 2342 provides,

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of —
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
>
> *****

[9]Section 402(b) provides:

> *****
>
> (b) Appeals may be taken from decisions and orders of the [FCC] to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> (2) By any applicant for the renewal or modification of any such instrument of authorization, whose application is denied by the Commission.
>
> (3) By any party to any application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
>
> (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
>
> *****
>
> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

courts of appeals[10] and, in the case of licensing decisions, in the District of Columbia Circuit alone.[11] The Supreme Court has declared that "[l]itigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939, 80 L. Ed. 2d 480 (1984) (citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 91 S. Ct. 203, 208, 27 L. Ed. 2d 203 (1970)). Yet that is precisely the purpose of Bywater's suit. The association's plea before this court is that we "maintain District Court jurisdiction over both facilities so that, in the event that the FCC denies and/or revokes permits for their operation, their removal from the Historic District can be assured."

In *ITT World Communications*, ITT brought its claim against the FCC under the APA, 5 U.S.C. § 703,[12] arguing that the court of appeals was an inadequate forum because the record

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[10]*See South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107, 1114 (5th Cir. 1984) ("the exclusive method for obtaining judicial review of FCC action is a direct appeal to the court of appeals pursuant to [the applicable statute]").

[11]*See infra* Part II.

[12]Section 703 provides as follows:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

had not been fully developed. The court, rejecting that argument, observed that the court of appeals could remedy any deficiencies in the record with a remand to the agency. 466 U.S. at 469. Hence, the Court declared, the APA was not a proper vehicle for circumventing the special statutory review process.

That is not the last word, however, since the private right of action arising under the NHPA might be an alternative basis for Bywater's suit in district court. Thus, some tension exists between section 470w-4, as construed in *Vieux Carre*, and the specific statutory provisions governing appeals of FCC decisions. We resolve that tension in favor of Congress's specific and obvious intent to restrict to the circuit courts any appeals from rulings of the FCC. Though we have construed section 470w-4 to create a private right of action that may be brought in "any U.S. District Court," *Vieux Carre*, at 458, we find no intent in the legislative history of that section to override the special provisions concerning the FCC.[13] We follow the lead of the court in *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979), in recognizing that

> Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur.... If ... there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive

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[13]The House Report states simply,

> The intent is to ensure that property owners, non-profit organizations and interestered individuals who may otherwise lack the means for court action be awarded reasonable loss for actions taken under this Act. The intent is not to award costs for frivolous suits against Federal agencies.

H.R. No. 1457, 9th Cong., 2d Sess. 46 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6378, 6409.

means of obtaining judicial review in those cases to which it applies.

Indeed, any doubts we might have about Congress's intent in these matters is resolved in the APA, which states, "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5. U.S.C. § 703.

For similar reasons, we must also reject the Mandamus and Venue Act and the Declaratory Judgment Act as independent predicates for district court jurisdiction in this case.[14] Aside from our adherence to the general principle that Congress's exclusive and specific review procedure should be followed, we observe that the Mandamus and Venue Act also fails to confer jurisdiction in that "it is an extraordinary remedy that is not available when review by other means is possible." *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) (citing *Kerr v. United States Dist. Court*, 426 U.S. 394, 403, 96 S. Ct. 2119, 2124, 48 L. Ed. 2d 725 (1976)). Likewise, where Congress has created a specific mode of judicial review of administrative orders, declaratory relief under 28 U.S.C. § 2201 is not available to those who have not pursued that remedy. *See American President Lines, Ltd. v. Federal Maritime Bd.*, 235 F.2d 18 (D.C. Cir. 1956). Our courts "recognized early in the development

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[14]Bywater would also have us premise jurisdiction upon the old workhorse, 28 U.S.C. § 1331. But Congress may, as 47 U.S.C. § 401(a) and (b) indicate, narrow that jurisdiction; to the extent that Bywater argues that the district court could retain "residual federal question jurisdiction" on the ground that the agency's violation might be found a patent abuse of its authority or a manifest infringement of a substantive right, we must reject that jurisdictional basis also. Nothing precludes Bywater from obtaining immediate remedies from the District of Columbia Circuit. *See Tennessee Dep't of Employment Sec. v. Secretary of Labor*, 801 F.2d 170, 175 n.8 (6th Cir. 1986).

of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge." *Port of Boston Marine Terminal Ass'n*, 400 U.S. at 68, 91 S. Ct. at 208 (citing *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907)).[15]

II

For specified litigants appealing FCC orders, courts have interpreted 47 U.S.C. § 402(b) to allow venue only in the District of Columbia Circuit. *See FCC v. Columbia Broadcasting Sys.*, 311 U.S. 132, 136, 61 S. Ct. 152, 153, 85 L. Ed. 87 (1940); *Campos v. FCC*, 650 F.2d 890, 892 (7th Cir. 1981). Bywater's complaint falls within category (6) of section 402(b), which provides that appeals may be taken before the District of Columbia Circuit "[b]y any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection." In Bywater's prayer to this court, it admits that it would be "premature," because Bywater has not yet exhausted its administrative remedies, for this court or the district court *a quo* to act until the FCC has issued an order with respect to

[15]We note that by any such reasoning, we do not thereby defeat any private right of action that may exist against *other* agencies not in compliance with the NHPA. Nothing in our opinion should be read as precluding Bywater, or similar associations aggrieved by an agency's failure to follow the NHPA's procedures, from bringing suit against that agency in the district court. *See, e.g., Vieux Carre* (suit against Army Corps of Engineers); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 278-82 (3d Cir. 1983) (action against Department of Housing and Urban Development). But where, as here, Congress has established exclusive procedures for judicial review of a particular agency's actions, we are bound to follow those dictates. *See Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S.Ct 551, 558 13 L.Ed.2d 386 (1965).

Crescent City's application and a final order, after entertaining Bywater's petition to revoke, with respect to Notel's license. Instead, Bywater asks that we "maintain jurisdiction" until these events have occurred. But if and when those events occur, Bywater's complaint will fall squarely within section 402(b)(6), and venue will lie only in the District of Columbia Circuit. Hence, any order from our court requiring the district court to "preserve" jurisdiction pending issuance of the FCC's final orders would be futile. The district court therefore properly dismissed Bywater's suit.

III

The district court correctly determined that it was without jurisdiction to hear this complaint against the FCC. When the FCC's final orders have been issued, Bywater must follow the path Congress has laid out for judicial review of those decisions. We note that our ruling should in no way be read as a comment on the merits of Bywater's claims against the FCC.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BYWATER NEIGHBORHOOD ASSOCIATION	*	CIVIL ACTION
VERSUS	*	NO. 88-5086
WILLIAM J. TRICARICO, ET AL	*	SECTION "D" (5)

ORDER OF DISMISSAL

In this action, Plaintiffs seek a declaratory judgment decreeing that the Federal Communications Commission has failed to comply with the provisions of the National Historic Preservation Act and the National Environmental Policy Act and all FCC and advisory council regulations promulgated thereunder and an injunction enjoining the FCC and Crescent City Communications Company, Inc. of Delaware from construction of a certain TV microwave tower and a further mandatory injunction enjoining the FCC and Notel, Inc., ordering them to remove a certain domestic satellite earth station in New Orleans, Louisiana, plus attorney fees and costs.

On December 7, 1988, the court heard Motions by Defendants to Dismiss. After considering the argument of counsel and the memorandum submitted by the parties, this court finds it lacks jurisdiction because Plaintiff has failed to exhaust its appropriate administrative remedies and furthermore, challenges to FCC licensing matters including applications for construction permits lie exclusively within the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. See, 47 U.S.C. § 402(b)(1) and (6); *FCC v. ITT World Communications*, 466 U.S. 463, 468 (1984) and *Telecommunications Research & Action Center v. FCC*, 750

F.2d 70, 75 (D.C. Cir. 1984).

Accordingly, this matter is hereby DISMISSED for lack of jurisdiction.

New Orleans, Louisiana, this 8 day of December, 1988.

/s/ A. J. McNamara
UNITED STATES DISTRICT JUDGE

National Historic Preservation Act (NHPA)

16 U.S.C. § 470f

§ 470 of Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470w-4

§ 470-4 Attorneys' fees and costs to prevailing parties in civil actions

In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Section 102 of the National Environmental Policy Act (NEPA)

42 U.S.C. § 4332

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the

views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

The Administrative Procedure Act

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity or judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

The Hobbs Act

28 U.S.C. § 2342

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
>
> * * * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

The Federal Communications Act

47 U.S.C. § 402(b)

§ 402 Judicial review of Commission's orders and decisions — Procedure

* * * *

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the Holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

Regulations of the Federal Communications Commission (FCC)

47 C.F.R. § 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (*see* §§ 1.1308 and 1.1311) and may require further Commission environmental processing (*see* §§ 1.1314, 1.1315 and 1.1317):

* * * *

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (*See* 16 U.S.C. 470w(5); 36 CFR 60 and 800).

NOTE: The National Register is updated and re-published in the FEDERAL REGISTER each year in February. To ascertain whether a proposal affects a historical property of national significance, inquiries also may be made to the appropriate State Historic Preservation Officer, *see* 16 U.S.C. 470a(b); 36 CFR Parts 63 and 800.

* * * *

(c) If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (*See* § 1.1313). The Bureau shall review the petition and consider the environmental concerns that have

been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (*see* § 1.1308 and 1.1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

(d) If the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA. The Bureau will review and consider the EA as in paragraph (c) of this section.

47 C.F.R. § 1.1308 Consideration of environmental assessments (EAs); findings of no significant impact.

(a) Applicants shall prepare EAs for actions that may have a significant environmental impact (*see* § 1.1307). An EA is described in detail in § 1.1311 of this part of the Commission rules.

(b) The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect. To assist in making that determination, the Bureau or the Commission may request further information from the applicant, interested persons and agencies and authorities which have jurisdiction by law or which have relevant expertise.

> NOTE: With respect to actions specified under § 1.1307(a)(3) and (a)(4), the Commission shall solicit and consider the comments of the Department of Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation, respectively, in accordance with their established

procedures. *See* Interagency Cooperation-Endangered Species Act of 1973, as amended, 50 CFR Part 402; Protection of Historic and Cultural Properties, 36 CFR Part 800. In addition, when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe. *See* § 1.1307(a)(5).

(c) If the Bureau or the Commission determines, based on an independent review of the EA and any applicable mandatory consultation requirements imposed upon federal agencies (*see* note above), that the proposal will have a significant environmental impact upon the quality of the human environment, it will so inform the applicant. The applicant will then have an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems. See § 1.1309. If the environmental problem is not eliminated, the Bureau will publish in the FEDERAL REGISTER a Notice of Intent (*see* § 1.1314) that EISs will be prepared (see §§ 1.1315 and 1.1317), or

(d) If the Bureau or Commission determines, based on an independent review of the EA, and any mandatory consultation requirements imposed upon federal agencies (*see* the note to paragraph (b) of this section), that the proposal would not have a significant impact, it will make a finding of no significant impact. Thereafter, the application will be processed without further documentation of environmental effect. Pursuant to CEQ regulations, see 40 CFR 1501.4 and 1501.6, the applicant must provide the community notice of the Commission's finding of no significant impact.

47 C.F.R. § 1.1309 Application amendments.

Applicants are permitted to amend their applications to reduce, minimize or eliminate potential environmental pro-

blems. As a routine matter, an applicant will be permitted to amend its application within thirty (30) days after the Commission or the Bureau informs the applicant that the proposal will have a significant impact upon the quality of the human environment (*see* § 1.1308(c)). The period of thirty (30) days may be extended upon a showing of good cause.

* * * *

47 C.F.R. § 1.1311 Environmental information to be included in the environmental assessment (EA).

(a) The applicant shall submit an EA with each application that is subject to environmental processing (*see* § 1.1307). The EA shall contain the following information:

(1) For antenna towers and satellite earth stations, a description of the facilities as well as supporting structures and appurtenances, and a description of the site as well as the surrounding area and uses. If high intensity white lighting is proposed or utilized within a residential area, the EA must also address the impact of this lighting upon the residents.

(2) A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect.

(3) A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in local community.

(4) A discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects, and any alternative sites or facilities which have been or might reasonably be considered.

(5) Any other information that may be requested by the Bureau or Commission.

* * * *

(b) The information submitted in the EA shall be factual (not argumentative or conclusory) and concise with sufficient detail to explain the environmental consequences and to enable the Commission or Bureau, after an independent review of the EA, to reach a determination concerning the proposal's environmental significance (e.g., wilderness areas, wildlife preserves, natural migration paths for birds and other wildlife, and sites of historic architectural, or archeological value). In the case of historically significant sites, it shall specify the effect of the facilities on any district, site, building, structure or object listed, or eligible for listing, in the National Register of Historic Places. It shall also detail any substantial change in the character of the land utilized (*e.g.*, deforestation, water diversion, wetland fill, or other extensive change of surface features). In the case of wilderness areas, wildlife preserves, or other like areas, the statement shall discuss the effect of any continuing pattern of human intrusion into the area (*e.g.* necessitated by the operation and maintenance of the facilities).

* * * *

47 C.F.R. § 1.1312 Facilities for which no construction permits is required.

In the case of facilities for which no construction permit is required or for which a waiver request for a construction permit has been granted under 47 U.S.C. 319(d), the information required by § 1.1311 shall be submitted and ruled on by the Commission, and the environmental processing (if invoked) shall be completed before authorization of the facilities is granted.

47 C.F.R. § 1.1313 Objections.

(a) In the case of an application to which section 309(b) of the Communications Act applies, objections based on environmental considerations shall be filed as petitions to deny.

(b) Informal objections which are based on environmental considerations must be filed prior to grant of the construction permit, or prior to authorization for facilities that do not require construction permits, or pursuant to the applicable rules governing services subject to lotteries.

Regulations of the Advisory Council on Historic Preservation

36 C.F.R. § 800.1 Authorities, purposes, and participants.

(a) *Authorities.* Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertaking on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these

responsibilities, commonly called the section 106 process.

(b) *Purposes of the section 106 process.* The Council seeks through the section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest.

36 C.F.R. § 800.1(c) Participants in the section 106 process—

(2) *Interested Person*

(ii) *Applicants for Federal assistance, permits, and licenses.* Where the undertaking subject to review under section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the section 106 process in the manner prescribed in these regulation.

36 C.F.R. § 800.2(o)

(o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

36 C.F.R. 800.3(c)

(c) *Timing*. Section 106 requires the Agency Official to complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule for the undertaking.

36 C.F.R. § 800.5 Assessing effects.

(a) *Applying the Criteria of Effect*. In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (§ 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

(b) *When no effect is found*. If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the findings, which shall be available for public inspection. Unless the State

Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in § 800.5(c) are followed.

* * * *

(e) *When the effect is adverse.* If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

Regulations of the Council on Environmental Quality (CEQ)

40 C.F.R. § 1506.1

§ 1506.1 Limitations on actions during NEPA process

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either

of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

December 6, 1988

IN REPLY REFER TO:
8930-CFD

Crescent City Communications Company, Inc.
7300 Lakeshore Drive, #28
New Orleans, Louisiana 70124

In re: TV STL Station (New)
BPTS-880711ME
BLTS-880711MF
New Orleans, Louisiana

Gentlemen:

This concerns your referenced application, FCC Form 313, filed on July 11, 1988, seeking authorization for an STL for TV station WCCL, New Orleans, Louisiana. For the reasons presented below, action on your application will be deferred.

As indicated in the December 5, 1988 letter of your attorney, Barbara R. Merlie, it appears that grant of your application will be a major action under Section 74.1307(a) of the Commission's Rules. *See* 47 C.F.R. Section 74.1307(a) (1987). Your attorney further advised that, an Environmental Assessment ("EA") is being prepared and will be submitted to the Commission as part of your application. The proposed site of the transmitter tower for the STL is located in the Bywater National Register District. That district is significant in American history and has been listed as such since January

23, 1986. Therefore, pursuant to Sections 1.1307(a)(3) and 1.1311 of the Commission's Rules, the EA is required. 47 C.F.R. Sections 1.1307(a)(3) and 1.1311 (1987). You are requested to submit the required EA within thirty days of the date of this letter. Action on your application will be deferred pending receipt of the EA.

We would also like to take this opportunity to advise you that Section 74.24 of the Rules would not provide you with authority to operate the STL on a short-term basis prior to the grant of the subject application. *See* 47 C.F.R. Section 74.24 (1987). That section of the Rules applies only to Part 73 licensees, not permittees. 47 C.F.R. Sections 74.24(a) and (d) (1987). Further, your application indicates that the proposed antenna would consist of a 200 foot tower. This exceeds the threshold limitations of Section 74.24(e) of the Rules. 47 C.F.R. Section 74.24(e) (1987). Finally, Section 74.24(b) of the Rules requires conformance with all normally applicable regulations. 47 C.F.R. Section 74.24(b) (1987). Hence, until an EA is filed and considered you would not be in compliance with all applicable regulations.

In light of the above, even if you were granted a station license for WCCL-TV before action on the referenced application was taken, you could not operate the STL on a short-term basis under Section 74.24 of our Rules.

Even assuming that Section 74.24 of the Rules applied, however, we are hereby suspending the provisions of that section pending resolution of the matter raised by the Bywater Neighborhood Association. Consequently, any operation of the STL must await specific authorization by this office.

We appreciate your prompt attention to these matters and share your attorney's desire to seek a quick and efficient resolution of the problems presented in this proceeding.

Sincerely,

/s/Alan J. Schneider, Chief
Auxiliary Services Branch
Audio Services Division
Mass Media Bureau

cc: Robert Fink
Barbara Merlie, Esq.
James Derbes, Esq.

Advisory Counsel on Historic
Preservation
The Old Post Office Building
1100 Pennsylvania Ave., NW, #809
Washington, DC 20004

Reply to: 730 Simms Street, Room 450
Golden, Colorado 80401

November 1, 1988

Ms. Eileen Chaney
Consumer Assistance &
Small Business Division,
Office of Public Affairs
Federal Communications Commission
Washington, D.C. 20554

REF: FCC permit issuance to broadcast from a location within the Bywater Historic District, New Orleans, Louisiana

Dear Ms. Chaney:

I am writing this as a follow-up to your response to my letter of June 30, 1988, to the Secretary about the above-referenced undertaking. In your letter dated July 27, 1988, you noted that an application is pending before the FCC Mass Media Bureau and that you were forwarding a copy of my letter to that office for consideration.

Subsequent to your response, we have not heard from anyone within FCC regarding the issuance of a Federal license or permit. This lack of response gives us concern because we understand from local residents that the applicant intends to initiate the FCC-licensed broadcasting effort in the next few weeks, just as soon a [sic] transmission tower can be erected and made operational within the historic district.

It appears to the Council that the erection of a tower allegedly 195 feet in height is a necessary outgrowth of the FCC's license to broadcast. A structure of this type and scale would likely be out of character with this and other nearby historic districts within the city and, as such, would affect the district of districts.

Section 106 of the National Historic Preservation Act and the Council's implementing regulations, 36 CFR Part 800, require that Federal agencies take into account the effects of their actions on historic properties and, if an effect is determined, afford the Council an opportunity to comment. Our files to date demonstrate that the FCC has not taken into account the potential direct and indirect effects of its issuance of a license or permit upon historic properties listed or determined eligible for inclusion in the National Register of Places [sic] and afforded the Council and opportunity to comment. We urge the FCC to give this compliance matter its urgent attention in order that the compliance requirements of Section 106 of the Act may be met in a timely manner.

Sincerely,

/s/ Robert Fink
Director, Western Office
of Project Review

No. 89-898

(2)

Supreme Court, U.S.
FILED
FEB 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

BYWATER NEIGHBORHOOD ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to review environmentally based challenges to an ongoing Federal Communications Commission broadcast licensing proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-898

BYWATER NEIGHBORHOOD ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 879 F.2d 165. The opinion of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1989. On November 6, 1989, Justice White extended the time within which to petition for a writ of certiorari to and including December 6, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory and Regulatory Background.* The Federal Communications Commission has exclusive jurisdiction under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, to license the use of the radio spectrum. 47 U.S.C. 301. Television microwave stations, known as "studio-transmitter links" (STLs),[1] are among the types of facilities the FCC licenses. STLs send a broadcast station's signal from its studio to its transmitter for transmission to the general public. They may be located on buildings, on existing towers, or—as proposed in this case—atop a specially constructed tower.

a. Applicants for certain facilities, including, for example, radio or television broadcast stations, must receive specific permission to construct their facilities (47 U.S.C. 319(a) and (d)). When the station is ready to go on the air, the owner applies for an operating license (47 U.S.C. 319(c)). For certain other facilities, the applicant files a single application for permission both to construct and to operate the facility. See *UA-Columbia Cablevision, Inc.*, 55 F.C.C.2d 656, 660 (1975).

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[1] An STL is defined at 47 C.F.R. 74.601(b), which states as follows:

> *TV STL station (studio-transmitter link).* A fixed station used for the transmission of TV program material and related communications from the studio to the transmitter of a TV broadcast or low power TV station or other purposes as authorized in § 74.631.

Its permissible uses are set forth in 47 C.F.R. 74.631(b):

> A television broadcast STL station is authorized to transmit visual program material between the studio and the transmitter of a television broadcast station for simultaneous or delayed broadcast.

STLs are in a third category of facilities, in which the FCC licenses only the operation, not the construction, of the facility. FCC Form 327, 50 Fed. Reg. 23,417, 23,418 (1985); see *Amendment of Part 73 of the Commission's Rules Concerning Licensing Procedures and Reporting Requirements in the Cable Television Relay Service (Cable Relay Service)*, 100 F.C.C.2d 1136, 1139 (1985). Although the applicant need not receive an operating permit before building such a facility, it cannot operate the facility until it applies for and receives permission to do so (47 U.S.C. 301). With this "one-step" procedure, an applicant that constructs any part of its facility or appurtenant structures before receiving operating authority takes the risk that such authority will be denied and it will be unable to use the facility.

Construction of facilities subject to the one-step procedure is thus generally governed only by local regulations and zoning restrictions. See 47 C.F.R. 74.631-74.632.[2] Nevertheless, the FCC will not authorize the operation of facilities unless it has reasonable assurance that the facility will comply with local ordinances. For example, the FCC will not issue an operating permit for a transmitter to be located on top of a supporting tower the construction of which would be prohibited by local zoning restrictions. See, *e.g.*, *Northbanke Corp.*, 46 Rad. Reg. 2d (P & F) 453, 457 (FCC 1979).

b. When the FCC receives an application to operate an STL, the agency announces the filing to the public (47 C.F.R. 73.3564(c)). Members of the public may challenge the STL application by filing

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[2] Of course, if a proposed STL supporting tower would constitute a potential hazard to air traffic, federal regulations apply. See 47 C.F.R. 17.7.

an informal objection at any time before the FCC acts on the application (47 C.F.R. 1.41, 73.3587).[3] If the FCC receives an informal objection it will consider the allegations therein, together with the response of the applicant, before deciding whether to grant the application. The FCC may grant an application only if it finds that the "public interest, convenience and necessity would be served" thereby (47 U.S.C. 309 (a)).

c. FCC public interest determinations are subject to the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.* Under Section 106 of the NHPA, 16 U.S.C. 470f, a federal agency head with jurisdiction over a federally licensed undertaking must consider the effects of the undertaking on properties included in or eligible for the National Register of Historic Places. Before approving any such undertaking, the agency must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. See also 36 C.F.R. 800.1(c)(i) and 800.6 *et seq.* By FCC regulation, the Commission complies with these NHPA-imposed duties by requiring applicants who seek to operate "[f]acilities that may affect districts, sites, buildings, structures or objects * * * that are listed, or are eligible for listing, in the National Register of Historic Places" to comply with special processing requirements (47 C.F.R. 1.1307). Those applicants must note in the application that the facility might have a significant impact on a historic site, and must provide the Commission with sufficient information

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[3] Section 309(c)(2)(E) and (d)(1) of the Communications Act, 47 U.S.C. 309(c)(2)(E) and (d)(1), preclude filing of a formal petition to deny an STL application. Compare 47 U.S.C. 309(b) and (d)(1).

to enable the FCC to carry out its duties under the NHPA (47 C.F.R. 1.1308(a)).[4] If the applicant notes the possibility of significant historic preservation concerns, the FCC then consults with the Advisory Council before determining whether the facility will have a significant impact on a historic site (47 C.F.R. 1.1314(d); 36 C.F.R. 800.6). If such an impact is found to exist, the FCC's rules specify procedures to mitigate the impact or to balance the need for the facility against the impact (47 C.F.R. 1.1314-1.1319). Under the one-step licensing procedure, the license application must contain the necessary information, and any special processing required must be completed before the license is granted (47 C.F.R. 1.1312). Informal objections may include challenges to the adequacy of compliance with these NHPA procedures (47 C.F.R. 1.1307(c), 1.1313).

d. The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals by any person "who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application" for a construction permit or station license (47 U.S.C. 402(b)(1) and (6)).

2. *History of the Case.* Petitioner challenges an as yet incomplete FCC licensing proceeding, seeking to enjoin construction of an STL facility by respondent

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[4] The FCC is entitled to rely on the representations of applicants, who are "well aware of their duty, not only to avoid positive untruths, but to 'be scrupulous in providing complete and meaningful information.'" *Bilingual Bicultural Coalition on Mass Media, Inc.* v. *FCC*, 595 F.2d 621, 635 (D.C. Cir. 1978) (quoting *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966)).

Crescent City Communication Company, Inc., which currently holds a television station construction and operating permit for WCCL-TV, Channel 49 in New Orleans.[5] On July 11, 1988, respondent Crescent City applied, pursuant to 47 U.S.C. 308-309 (1982 & Supp. V 1987), for a permit to operate an appurtenant STL. The application did not disclose that the supporting tower respondent Crescent City proposed to build for its STL would be located in the Bywater Historic District in New Orleans, which is listed in the National Register of Historic Places by the United States Department of the Interior (Pet. 7). The application was placed on public notice on July 25, 1988. FCC Public Notice No. 14,224.

On November 16, 1988, petitioner filed its complaint in district court seeking to enjoin further construction of the tower in the historic district; on December 19, 1988, it petitioned the Commission to deny respondent Crescent City's STL application. On December 15, 1988, respondent Crescent City submitted an environmental assessment as an amendment to its FCC license application. See 47 C.F.R. 1.1307(a)(4) and 73.3522. As required by 47 C.F.R. 1.1307(a)(4), the EA revealed that the tower is located in the Historic District. At that time, the FCC deferred further processing of respondent Crescent City's STL license application, in order to ensure compliance with the FCC's NHPA regulations, 47 C.F.R. 1.1308. Pet. App. 29a-30a.[6] Thus, al-

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[5] Crescent City currently operates the station under "program test authority" pursuant to 47 C.F.R. 73.1620. The station's application for its full operating license is pending at the FCC.

[6] Processing was further delayed following a February 22, 1989, state court order revoking the local Board of Zoning

though petitioner asserts (Pet. 9) that the STL supporting tower has been constructed, the FCC has, to date, neither approved nor denied the application (Pet. App. 2a). Accordingly, the STL facility is not operative.

In its complaint, petitioner alleged that the FCC violated the NHPA, as well as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, by failing to consult with the Advisory Council and by failing to take into consideration the environmental impact of the project before allowing the tower's construction. Petitioner asserted that "the FCC has authorized the construction and installation of * * * [the] STL tower. The FCC contemplates no further action or scrutiny of this project prior to the construction of the tower." Complaint 11. As relief, petitioner requested (1) a declaratory judgment that the FCC violated the NHPA and NEPA; (2) a temporary restraining order and preliminary injunction enjoining construction and operation of the support tower; and (3) award of attorney's fees and costs.[7]

Adjustment's approval of a zoning variance for the STL tower's construction. That order resulted from a suit by petitioner against the zoning board challenging the grant of two variances to permit the construction of the tower and transmitting antennas. No. 88-13047 (La. Civ. Dist. Ct. Orleans Parish) (App., *infra*, 1a-5a). The FCC informs us that respondent Crescent City is currently utilizing, pursuant to temporary FCC authorization, an STL mounted on a building. Although respondent Crescent City has indicated its continued interest in obtaining an operating permit for the STL at issue in the instant proceeding, no further action is contemplated on its application for that permit until the zoning question is resolved.

[7] The complaint also sought a permanent injunction requiring removal of an appurtenant facility constructed by re-

The district court dismised the complaint on the ground that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over this matter (Pet. App. 10a-11a), and the court of appeals affirmed (*id.* at 1a-9a). The court of appeals agreed that jurisdiction over challenges to FCC licensing actions lies exclusively with the District of Columbia Circuit (*id.* at 4a-8a); it also rejected petitioner's claim of jurisdiction under the Mandamus Act, 28 U.S.C. 1361, as well as the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.*, adhering to "the general principle that Congress's exclusive and specific review procedure should be followed" (Pet. App. 7a). The court observed that once a final order issues with regard to the STL application, petitioner "must follow the path Congress has laid out for judicial review" of that order (*id.* at 9a).

ARGUMENT

1. Petitioner's objection is to the construction of the support tower for the STL facility. Its effort to obtain a remedy from the FCC for that construction is based on a fundamental misapprehension of the scope of the Commission's licensing authority. The Commission licenses the operation of the facility. It does not license the construction of its support tower; still less does it control the applicant's decision con-

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spondent Notel, a company associated with respondent Crescent City. That request for relief was based on the complaint's challenge to two related applications of respondent Notel to construct and operate two satellite earth stations. The petition does not seek review of the court of appeals' determination that petitioners failed to exhaust their administrative remedies before seeking judicial review of those applications. See Pet. 9 n.10.

cerning where the tower will be placed. And the decision whether the facility is to be placed on a building, an existing tower, or a tower constructed expressly for the purpose, is up to the applicant, not the FCC. The FCC has no more authority to direct the applicant to remove the support tower at issue here than it would have to require the removal of a building, simply because the applicant intended to place its STL facility on it. The dispute over the construction of the tower is for the local authorities, not the FCC. See note 6, *supra*. Moreover, despite petitioner's apparent contrary assumption, the Commission's actions in this case convincingly demonstrate that the Commission will require compliance with the applicable NHPA procedures before issuing any license for the operation of the STL on the challenged tower.[8]

2. In any event, the court of appeals correctly concluded that review of FCC licensing actions may be had only in the United States Court of Appeals for the District of Columbia Circuit. That determination does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

The review of broadcast licensing matters is vested in the United States Court of Appeals for the District of Columbia Circuit by 47 U.S.C. 402(b), which provides that:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> * * * *

---

[8] Petitioner has not contended that those procedures are inadequate.

> (6) By any * * * person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application * * *.

Although this provision refers in terms to "decisions and orders of the Commission," and permits an appeal by a person "affected by any order," it is clearly established that it vests judicial review of *all* cases "involving the exercise of the Commission's radio-licensing power"—including a refusal to exercise that power—in the United States Court of Appeals for the District of Columbia Circuit. *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962) (denial of a petition to revoke a construction permit).

Even in the absence of an express exclusivity provision—like that contained in 28 U.S.C. 2342(1) for certain final FCC orders—explicit statutory review procedures of the kind contained in 47 U.S.C. 402(b) are presumed to be exclusive of other avenues of review. *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965). Such grants of exclusive review power have long been held to be constitutional. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938).

Because Congress has created a statutory review scheme that is exclusive, the federal district courts lack jurisdiction over licensing matters. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 741 (1985); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (*TRAC*) ("even where Congress has not expressly stated that statutory jurisdiction is 'exclusive,' as it has here with regard to final FCC actions,

a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute"). As the court recognized in *TRAC*, it follows that the District of of Columbia Circuit has exclusive jurisdiction, even in the absence of final agency action, "to hear suits seeking relief that might affect [that court's] future statutory power of review." 750 F.2d at 72.

Similarly, district court review is not available under the Administrative Procedure Act, 5 U.S.C. 703, which provides for district court review when statutory review is inadequate: "[w]here statutory review is available in the Court of Appeals it will rarely be inadequate." 750 F.2d at 78.[9] The court below therefore correctly gave effect to "Congress's specific and obvious intent to restrict to the circuit

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[9] Petitioner asserts (Pet. 5) that 16 U.S.C. 470w-4, the NHPA provision governing the award of attorney fees, provides another alternative jurisdictional basis for its suit. The court of appeals, relying on its previous decision in *Vieux Carre Property Owners, Residents & Assocs.* v. *Brown*, 875 F.2d 453 (5th Cir. 1989), cert. denied, No. 89-563 (Jan. 8, 1990), similarly suggested that Section 470w-4 creates a private right of action (Pet. App. 3a, 6a). We submit that the statutory language (which provides in relevant part that "[i]n any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, * * * the court may award attorneys' fees, * * * and other costs") simply permits the award of attorney fees and costs in civil actions otherwise authorized to be brought in district courts. In any event, even if this provision could otherwise be interpreted as creating a right of action to enforce the NHPA, it could not overcome the explicit, limited jurisdictional provision contained in Section 402(b), as the court of appeals correctly recognized (Pet. App. 6a-7a). Accordingly, the court's remarks about the attorney fee provision of the NHPA are dicta.

courts any appeals from rulings of the FCC" (Pet. App. 6a). It accordingly determined that, upon issuance of a final licensing order, "[petitioner's] complaint will fall squarely within section 402(b)(6), and venue will lie only in the District of Columbia Circuit." Pet. App. 9a.

The principles just discussed are not affected by the fact that petitioner seeks to litigate environmental issues. It is clearly established that, even in such circumstances, statutorily prescribed review procedures must be followed; there is no concurrent jurisdiction in the district court simply because a violation of an environmental statute such as NEPA or the NHPA is alleged. *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979); *Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 192-193 (7th Cir.), cert. denied, 479 U.S. 847 (1986); *City of Alexandria* v. *Helms*, 728 F.2d 643 (4th Cir. 1984); *Washington Utilities & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1167-1168 (9th Cir.), cert. denied, 423 U.S. 836 (1975).[10]

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[10] For example, in *City of Rochester* v. *Bond*, *supra*, the appellants attempted to invoke district court jurisdiction to challenge an FAA order (a "no hazard determination" regarding a radio antenna tower) and the resulting FCC construction permit. They maintained that both agencies failed to comply with NEPA by not preparing an Environmental Impact Statement, and alleged that district court review was available for their NEPA claims. The court of appeals stated unequivocally that "we disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be." 603 F.2d at 936. Accordingly, review of the FAA order and the FCC permit was available only in the court of appeals. *Id.* at 938-939.

The case cited by petitioner (Pet. 11, 14) in support of its claim that the circuit courts allow interim review of agency actions pending final determinations stands alone, and in any event does not present a square conflict with the decision below. In *Susquehanna Valley Alliance* v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981), the court held that a private party seeking to compel agency compliance with NEPA need not exhaust administrative remedies before filing suit in federal district court to challenge the Nuclear Regulatory Commission's informal authorization of the discharge of contaminated water.[11] In *Susquehanna*, the plaintiffs challenged a specific agency action—authorization to the licensee to begin installation of a water treatment system without NEPA compliance (619 F.2d at 240 n.10). Here, by contrast, petitioner acknowledges that the FCC has given no approval at all. Pet. 6, 7-8. Thus, while we disagree with the result reached in *Susquehanna*, the facts there presented a more colorable justification for judicial intervention than is presented here.

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[11] In dissenting from the denial of certiorari in *Susquehanna*, Justice Rehnquist (joined by the Chief Justice and Justice Powell) noted (449 U.S. at 1096, 1100) that the holding of the Third Circuit is contrary to this Court's settled teaching on exhaustion of administrative remedies, and that the "trifurcated review procedure [resulting from the Third Circuit's holding] is not only inefficient, duplicating judicial and administrative effort, but more importantly, it leads to premature interference with agency processes, contrary to the policy underlying direct review statutes." Justice Rehnquist observed that the Solicitor General, in the government's memorandum in opposition to the petition for certiorari, stated that *Susquehanna* had been incorrectly decided, but was anomalous and probably would be of little precedential effect. 449 U.S. at 1100.

Moreover, the holding in *Susquehanna* has subsequently been distinguished by the Seventh Circuit as applying in "very special circumstances, as when the administrative proceeding is informal and the record of that proceeding has to be reconstructed in the judicial review proceeding before the judicial review proper can begin." *Denberg* v. *United States R.R. Retirement Bd.*, 696 F.2d 1193, 1196 (1983), cert. denied, 466 U.S. 926 (1984). There is no indication in this case that the record before the FCC will be inadequate to review compliance with the NHPA.[12]

2. Petitioner's second question is not properly presented on this record. Petitioner asserts that "jurisdiction over the nonfederal entities is necessary to afford [petitioner] complete relief, regardless of the forum in which the action must be brought." Pet. 16-17. But the court of appeals here dismissed the complaint solely because, under the statutory scheme enacted by Congress, it has no jurisdiction to consider such complaints. Because its holding related

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[12] Petitioner also suggests (Pet. 12 & n.17) that the importance of interim judicial review of "streamlined" agency licensing procedures is confirmed by *Friends of Sierra R.R.* v. *ICC*, 881 F.2d 663 (9th Cir. 1989), petition for cert. pending *sub nom. Tuolumne Park & Recreation Dist.* v. *ICC*, No. 89-701. In that case, the ICC refused to reopen agency proceedings authorizing abandonment of a railroad, in light of the passage of 16 months between the final agency action and the request for reopening. The court of appeals, without reaching the merits of petitioners' claims, simply held that it lacked jurisdiction over the tardy challenges. The only issue considered was the agency's refusal to reopen its proceeding, and the decision turned on the fact that no new evidence or changed circumstances justified the delay in seeking review of the agency action. Nothing in the decision suggests any deficiencies in consolidated agency review procedures similar to the FCC's "one-step" procedure.

only to the propriety of petitioner's selection of a forum, the court's perfunctory comment (Pet. App. 3a n.7)—that even if it had jurisdiction over the agency, the suit against the private respondents would have to be dismissed—is obiter dicta. Such dicta do not present a proper issue for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS
STATE OF LOUISIANA

NO. 88-13047 DIVISION "K"

BYWATER NEIGHBORHOOD ASSOCIATION, ET AL

versus

THE BOARD OF ZONING ADJUSTMENTS, ET AL

JUDGMENT

This matter came for trial on the petitioner's application for certiorari and review:

After considering the pleadings, the decision of the Board of Zoning Adjustments, the argument of Counsel and the law and for the written reasons assigned this day:

IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Board of Zoning Adjustments in the matter of Docket #93-88, the application of NOTEL, Inc. and in the matter of Docket #94-88, the application of Crescent City Communications Inc. be, and the same are hereby reversed and set aside and granting of variance to NOTEL, Inc. and Crescent City Communications, Inc. by the Board of Zoning Adjustments are both hereby reversed.

JUDGMENT READ, RENDERED AND SIGNED this 22nd day of February, 1989 at New Orleans, Louisiana.

/s/ Richard J. Ganucheau

RICHARD J. GANUCHEAU
Judge

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS
STATE OF LOUISIANA

NO. 88-13047 DIVISION "K"

BYWATER NEIGHBORHOOD ASSOCIATION, ET AL

versus

THE BOARD OF ZONING ADJUSTMENTS, ET AL

REASONS FOR JUDGMENT

The Bywater Neighborhood Association, Malcolm Heard, Jr. and Marc Cooper petition this Court to review the decision of the Board of Zoning Adjustments (hereinafter BZA) of the City of New Orleans upon the applications of Crescent City Communications Inc. (hereinafter Crescent City) and NOTEL Inc.

Crescent City filed an application for variance dated April 20, 1988 to be allowed to construct a 200 foot microwave link tower on its property described as 3327 Chartes Street between Desire and Piety Streets.

NOTEL, Inc. filed an application for variance dated April 18, 1988 from the 50 foot distance set back from all property lines for construction of transmitting antennas.

The Court feels that the information furnished the BZA by the applicants Crescent City and NOTEL, Inc. was incomplete and erroneous in the particulars set out herein below and that ". . . due notice to the interested parties . . ." as required by the zoning laws was not properly given.

As to the application for variance filed by Crescent City the Court finds that:

The Board of Zoning Adjustments was erroneously informed that Cresent City complied with all Federal Communications Commissions regulations concerning the proposed construction of the 200 foot tower;

The Board of Zoning Adjustments was not informed that the site of the tower was located in a National Historic District;

The Board of Zoning Adjustments was informed by the President of Crecent City that the proposed site was located in a light industrial zone, not near the residential districts;

The Board of Zoning Adjustments granted a variance, as was applied for by Crescent City, however the Zoning Ordinance does not authorize that grant.

As to the application by NOTEL, Inc. for a variance the Court finds that;

The survey of the property furnished with the application was of a parcel of property not owned by the applicant;

The notice requirement to interested parties was not met;

The Board of Zoning Adjustments was assured that all Federal Communications Commission requirements had been met; which was not correct;

The Board of Zoning Adjustments was told that no historic sites were involved in either application.

This Court is not empowered to substitute its judgment for that of the Board of Zoning Adjustments. The Court must uphold decisions of the Board unless it is shown that the decision is not supported by substantial and competent evidence or that the decision was arbitrary or unreasonable. *Gertler Vs. City of*

New Orleans 346 So2nd 288 (La. App. 4th Cir. 1977)

It appears from the record of the hearing before the Board of Zoning Adjustments that representations made by the applicants are not verified by the Board and that the accuracy of the information furnished was not checked. That may be due in part to the failure of any opponents to appear at the hearing or a lack of resources available to the Board.

The Board of Zoning Adjustments must find that *all* of the nine Standards for Variation set out in the Zoning Ordinance at Article 15, Section 2.3(1) have been met as a condition to granting a variance.

Given the errors and deficiencies in the applications filed by Crescent City and NOTEL the Board of Zoning Adjustments was unable, in the Court's opinion, to make the findings required by the Zoning Ordinance.

The plaintiffs seek review of the decision of the Board of Zoning Adjustments pursuant to La. R.S. 33:4727 and a similar provision of the Zoning Ordinance. The Court's authority in the premises is set out in L.A. R. S. 33:4227 E(5). Although this case seems appropriate for remand to the BZA to reconsider the application under review, no authority exists, in the Court's view for such an order. This Court may only reverse, confirm or modify the decision brought for review.

For the above reasons, the decision of the Board of Zoning Adjustments in these matters; Docket #94-88, the application of Crescent City Communications, Inc. and #93-88, the application of NOTEL, Inc., are both hereby reversed and set aside.

New Orleans, Louisiana this 22nd day of February, 1989.

/s/ Richard J. Ganucheau

RICHARD J. GANUCHEAU
Judge

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No. 89-898

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In The

Supreme Court of the United States

October Term, 1989

BYWATER NEIGHBORHOOD ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CRESCENT CITY COMMUNICATIONS COMPANY, INC. OF DELAWARE, AND NOTEL, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of the Rules of this Court, the National Trust for Historic Preservation in the United States (hereinafter, National Trust) submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.[1] This *amicus* brief addresses only the first question presented in the petition for a writ of certiorari, which relates to the jurisdiction of federal district courts over actions to enforce the National Historic Preservation Act and the National Environmental Policy Act against the Federal Communications Commission.

INTEREST OF AMICUS CURIAE

Congress chartered the National Trust in 1949 as a private, nonprofit organization to promote public involvement in the protection of America's historic resources and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468 (1988). The National Trust currently has more than 225,000 individual and 3,000 organizational members nationwide. In furtherance of its goal of preserving historic resources, the National Trust seeks to ensure compliance by the Federal Communications Commission (hereinafter, FCC) and other federal agencies with the National Historic Preservation Act (hereinafter, NHPA), 16 U.S.C. §§ 470 to 470w-6 (1988), and the National Environmental Policy Act (hereinafter, NEPA), 42 U.S.C. §§ 4321-4370a (1982 &

[1] The parties have consented to the appearance of the National Trust as *amicus*. Letters of consent from their counsel have been filed with the Clerk of this Court.

Supp. 1987). Conflicting and uncertain interpretations of statutes governing the proper forum for judicial review of agency noncompliance with NHPA and NEPA can, the National Trust believes, preclude effective enforcement of these statutes. That enforcement problem is evident in this case.

STATEMENT OF THE CASE

In this case, Crescent City Communications of Delaware (hereinafter, Crescent City) applied for an FCC license to broadcast from a 200-foot Studio Transmitter Link (STL) microwave tower to be used in conjunction with a new television broadcast station in New Orleans. The tower was to be built in the Bywater Historic District, near the historic French Quarter in New Orleans. The Bywater Historic District is listed in the National Register of Historic Places.[2] Pursuant to the FCC's "one-step" licensing procedure,[3] the agency allowed Crescent City to begin construction of the tower without a construction

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[2] *See* National Register of Historic Places; Annual Listing of Historic Properties for Fiscal Years 1986 and 1987, 53 Fed. Reg. 18,658, 18,673 (1988).

[3] *See, e.g.*, Licensing Procedures and Reporting Requirements in the Cable Television Relay Service, 50 Fed. Reg. 23,417, 23,418 (1985). Similar one-step procedures have been adopted by the Interstate Commerce Commission and the Nuclear Regulatory Commission. *See* 49 U.S.C. §§ 10903-10904 (1982 & Supp. 1987) (streamlined procedure for abandoning "exempt" rail lines); Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15,372 (1989) (one-step permitting for nuclear power reactors).

permit, while the FCC was considering Crescent City's application for a broadcasting license.

The Bywater Neighborhood Association (hereinafter, Neighborhood Association) filed a complaint in the United States District Court for the Eastern District of Louisiana, seeking to enjoin construction of the tower. The Neighborhood Association alleged that the FCC had a nondiscretionary duty to comply with NHPA and NEPA before allowing Crescent City to construct the tower.[4] The district court dismissed the complaint for lack of subject matter jurisdiction, holding that the United States Court of Appeals for the District of Columbia Circuit had exclusive jurisdiction over the action. The United States Court of Appeals for the Fifth Circuit affirmed. *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989). Crescent City has now completed construction of its television tower in the Bywater Historic District, although the FCC has not yet ruled on Crescent City's application for a broadcasting license.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for a writ of certiorari because (1) the Fifth Circuit's decision is in

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[4] Under Section 106 of NHPA, 16 U.S.C. § 470f, the FCC "shall . . . prior to the issuance of any license . . . take into account the effect of the undertaking" on historic resources "included in or eligible for inclusion in the National Register." Under NEPA, the FCC is required to prepare an environmental assessment or environmental impact statement considering the impacts of a project on historic resources prior to allowing a project to go forward. 42 U.S.C. §§ 4331(b)(4), 4332.

direct conflict with a decision by the Third Circuit, and (2) the Fifth Circuit misconstrued the jurisdictional framework established by Congress for judicial review of agency noncompliance with NHPA and NEPA.

ARGUMENT

I. Certiorari Should Be Granted to Resolve a Conflict Between the Fifth and Third Circuits Regarding the Jurisdiction of District Courts to Enforce NHPA and NEPA Compliance by Federal Agencies.

This Court should grant the petition for a writ of certiorari because the Fifth Circuit's decision below conflicts with the Third Circuit's decision in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981).

The Fifth Circuit held that the district court did not have jurisdiction over the Neighborhood Association's action to enjoin the construction of a television tower in a designated historic district. The court reached that conclusion despite the Neighborhood Association's allegation that the FCC was allowing potentially harmful construction to occur without any compliance with the requirements of NHPA or NEPA.

The Fifth Circuit based its decision on Section 402(b)(6) of the Communications Act, which provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over challenges to FCC orders "granting or denying any [license or

permit] application." 47 U.S.C. § 402(b)(6).[5] The court held that the Neighborhood Association's action fell within that jurisdictional provision. The court noted, however, that the FCC had not yet issued any "final orders" that would trigger the exclusive statutory review. *Bywater*, 879 F.2d at 169. The Neighborhood Association, the court held, would have to await such an order before it could bring a challenge in the United States Court of Appeals for the District of Columbia Circuit under Section 402(b)(6). Thus, the Fifth Circuit denied the Neighborhood Association any judicial forum in which to dispute the construction of the tower prior to the FCC's issuance of a final licensing decision.

Faced with similar facts, the Third Circuit reached a different conclusion in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981).[6] In that case, the plaintiffs sought to enjoin, pursuant to NEPA, the construction and operation of a system for decontamination of radioactive water by operators of a nuclear power plant. The NRC had authorized the construction of the system without requiring the operators to apply for a construction permit. *See Susquehanna Valley Alliance v.*

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[5] The Fifth Circuit also noted that the Administrative Orders Review Act, 28 U.S.C. § 2342 (the "Hobbs Act"), vests exclusive jurisdiction over appeals from the FCC's "final orders" in the circuit courts of appeals. *Bywater*, 879 F.2d at 167.

[6] Then-Associate Justice Rehnquist, joined by then-Chief Justice Burger and Justice Powell, dissented from the denial of certiorari in *Susquehanna*. 449 U.S. at 1096-1101.

Three Mile Island Nuclear Reactor, 485 F. Supp. 81, 83 (M.D. Pa. 1979). The Third Circuit noted that although the plaintiffs could seek review in the courts of appeals of final NRC licensing orders pursuant to the jurisdictional provisions of the Hobbs Act and the Atomic Energy Act,[7] the NRC had not yet issued such a final order. *Susquehanna*, 619 F.2d at 241.

The Third Circuit was troubled by this gap in judicial review because it recognized that the timing of NEPA compliance can be extremely important, "especially when private parties are permitted by a federal agency to make major construction expenditures in advance of consideration of environmental issues." *Id.* The court therefore held that "a claim that NRC is not complying with the National Environmental Policy Act [in allowing construction prior to the issuance of a final order] states a cause of action over which the district courts have subject matter jurisdiction." *Id.*

The Fifth and Third Circuit decisions present a clear conflict. Although they involved different agencies, they both interpreted similar special review statutes that vest exclusive review of final licensing orders in the courts of appeals. In addition, they both addressed the scope of district court jurisdiction over NEPA claims arising prior to the issuance of final orders by an agency. Whereas the Fifth Circuit denied any judicial review of those claims until the agency issues a final licensing decision, and then only in the United States Court of Appeals for the District of Columbia Circuit, the Third Circuit held that district

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[7] *See* 28 U.S.C. § 2342 (1982) (Hobbs Act); 42 U.S.C. § 2239 (1982) (Atomic Energy Act).

courts have jurisdiction to hear those claims. This Court should resolve that conflict.[8]

A resolution of that conflict would allow this Court to eliminate some of the pervasive uncertainty regarding the scope of district court jurisdiction over pre-licensing challenges to agency action or inaction.[9] This uncertainty

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[8] The decision below also is inconsistent with several other federal court decisions that have held that district courts have jurisdiction over challenges to agency noncompliance with NEPA despite the existence of a special review statute. *See, e.g., West Chicago, Ill. v. NRC*, 701 F.2d 632, 652 (7th Cir. 1983) (district court has jurisdiction to hear challenge to agency's noncompliance with NEPA "[w]hen there has been no final agency action permitting review in the court of appeals") (dicta); *City of Irving v. FAA*, 539 F. Supp. 17, 34 (N.D. Tex. 1981) (district court had jurisdiction over NEPA challenge of FAA's decision not to issue an environmental impact statement where there was no agency order to review); *Harlem Valley Transp. Assn. v. Stafford*, 360 F. Supp. 1057, 1062-63 (S.D.N.Y. 1973) (action to enforce agency compliance with "plain legal requirement" of NEPA within jurisdiction of district court despite ICC statutory review provision), *aff'd*, 500 F.2d 328, 334 (2d Cir. 1974); *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (district court had jurisdiction because the plaintiffs were "not requesting review of the granting or denying of a license").

[9] *See generally Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 74-75 (D.C. Cir. 1984) (hereinafter, *TRAC*) ("[O]ur precedent concerning jurisdiction over interlocutory appeals from agency action (or inaction) is somewhat confusing for litigants attempting to select the proper forum for these claims."); *Local 1928 v. Federal Labor Relations Authority*, 630 F. Supp. 947, 950 (D.D.C. 1986) ("subject matter jurisdiction in controversies involving administrative agencies has been an issue that has caused significant confusion"); *Suburban O'Hare Commission v. Dole*, 603 F. Supp. 1013, 1017-18 (N.D. Ill.

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is especially problematic where, as here, the basis for the challenge is agency noncompliance with mandatory environmental review statutes. Clarification in this area is essential if litigants are to understand both when and where they should seek judicial review and if environmental review statutes are to be properly enforced.

II. The Fifth Circuit's Denial of Any Judicial Forum in Which to Challenge the FCC's Noncompliance with NHPA or NEPA Prior to the FCC's Issuance of a Final Licensing Order Is Contrary to Statutory Grants of Jurisdiction as Interpreted by the Courts.

The decision below erroneously denied the Neighborhood Association any forum in which to seek prelicensing enforcement of NHPA and NEPA. The decision, by misconstruing jurisdictional provisions in the Communications Act and the Hobbs Act, ignored the well-established jurisdiction of the district courts to enforce mandatory environmental review statutes.

A. Absent a Specific Statutory Review Provision, District Courts Have Jurisdiction Over Challenges to Agency Noncompliance with NHPA and NEPA.

The Administrative Procedure Act provides that administrative actions are presumptively subject to

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1985) ("Courts have encountered substantial difficulty in determining when a challenged administrative action falls within the scope of a statute directing exclusive review in the Court of Appeals.").

judicial review. *See* 5 U.S.C. § 702 (1988). This presumption applies to agency inaction where an agency has a nondiscretionary duty to act. *See* 5 U.S.C. § 551(13) ("agency action" defined to include "failure to act").[10]

Congress may, of course, specifically designate the judicial forum for such review. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979). Enforcement actions under NHPA and NEPA, for example, may properly be reviewed in the courts of appeals when the action is a challenge to an agency order that is subject to statutory review. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 (1978); *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 480-81 (2d Cir. 1988).

Where a challenge to agency action does not fall within the scope of a specific statutory review provision, however, " 'nonstatutory' review may be sought in the district court under any applicable jurisdictional grant." *City of Rochester*, 603 F.2d at 931. Thus, when an agency, through inaction, fails to comply with NHPA or NEPA, and the statutory review provisions do not apply, review

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[10] Agency compliance with NHPA or NEPA is not discretionary. 42 U.S.C. § 4332 (agencies "shall" comply with NEPA "to the fullest extent possible"); 16 U.S.C. § 470f (agency "shall . . . take into account the effect of the undertaking on [historic resources]"). *See also Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1845 (1989) (NEPA is an "action-forcing" statute); *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d 299, 302 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981) (NHPA is "mandatory").

may be sought in the district courts pursuant to other jurisdictional statutes.[11]

Three separate statutes, all of which the petitioner invoked in its complaint,[12] provide for district court jurisdiction over enforcement actions under NHPA and NEPA. Significantly, Congress, in NHPA, expressly created a private right of action which may be "brought in any United States district court by any interested person to enforce the provisions of [NHPA]." 16 U.S.C. § 470w-4. *See also Vieux Carre Property Owners, Residence & Associates, Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990). Further, an enforcement action under NHPA or NEPA presents a federal question, *see, e.g., Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1343 (D. Minn. 1988), and Congress has given district courts original jurisdiction over federal questions. *See* 28 U.S.C. § 1331 (1982). Also, where an agency fails to comply with its nondiscretionary duties under NHPA or NEPA, Congress has provided for enforcement actions in the nature of mandamus in the district courts. *See* 28 U.S.C. § 1361 (1982); *Harlem Valley*, 360 F. Supp. at 1063. These jurisdictional provisions clearly allow enforcement of NHPA and NEPA in the district courts.

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[11] *Cf. TRAC*, 750 F.2d at 72 (appellate courts have exclusive jurisdiction over challenges to agency inaction "that might affect [the courts'] future statutory power of review"). Unlike the claim at issue in *TRAC*, here "the underlying claim is not subject to the jurisdiction of the Court of Appeals (and thus adjudication of the claim in the District Court will not affect any future statutory review power of the Circuit Court)." *Id.* at 78. Because "a denial of review in the District Court will truly foreclose all judicial review," district court jurisdiction is appropriate. *Id.*

[12] The complaint in this case specifically pleaded jurisdiction under 16 U.S.C. § 470, *et seq.* and 28 U.S.C. §§ 1331, 1361. *See* Complaint at ¶ 5. The complaint is attached to this brief as an appendix.

B. The Neighborhood Association's Action Does Not Fall Within the Special Review Provisions of the Communications Act or the Hobbs Act Because the Neighborhood Association Is Not Challenging an FCC Licensing Decision or Other Final Order.

In holding that the district court lacked jurisdiction over the Neighborhood Association's action, the Fifth Circuit cited two special review statutes – Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), and the Hobbs Act, 28 U.S.C. § 2342. *Bywater*, 879 F.2d at 167. Section 402(b) of the Communications Act vests exclusive jurisdiction over appeals from FCC licensing decisions in the United States Court of Appeals for the District of Columbia Circuit. The Hobbs Act provides that the circuit courts of appeals have exclusive jurisdiction to review other FCC "final orders." Neither of those review statutes is applicable in this case.

The Fifth Circuit specifically found that the Neighborhood Association's claims fell within Section 402(b)(6) of the Communications Act, which provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals from FCC orders "granting or denying any [license or permit] application." Although the court recognized that the FCC had not yet issued an order granting or denying Crescent City's broadcasting license application, 879 F.2d at 169, the court apparently determined that the "purpose" of the Neighborhood Association's suit was to challenge the FCC's *future* licensing decision. *Id.* at 166.

The Fifth Circuit's conclusion cannot be squared with the plain language of the Neighborhood Association's

complaint. The complaint explicitly challenged only the FCC's allowance of construction of the television tower, and not the issuance of an FCC license – indeed, none has been issued. The complaint specifically alleged that the FCC violated NHPA by failing to consider historic and cultural impacts and to consult with the Advisory Council on Historic Preservation prior to allowing construction of the television tower. Complaint at ¶¶ 1, 21, 22, 25-31. The complaint also alleged that allowing construction of the tower without preparation of an environmental assessment was unlawful under NEPA. *Id.* at ¶¶ 1, 32-38. Moreover, the relief sought in the complaint is an injunction against "any steps toward construction of this tower . . . until such time as all defendants comply with the requirements of federal law." *Id.* at ¶ 1. *See also id.* at ¶¶ 39-40.

Thus, contrary to the Fifth Circuit's reasoning, the agency action at issue here – allowing construction of the tower without compliance with NHPA or NEPA – is not an "order of the Commission granting or denying any application" subject to exclusive review in the United States Court of Appeals for the District of Columbia Circuit under 47 U.S.C. § 402(b)(6) because the decision to allow construction is separate from the licensing decision. *See, e.g., Waterway Communications Systems, Inc. v. FCC*, 851 F.2d 401, 403 (D.C. Cir. 1988) (D.C. Circuit did not have jurisdiction to review FCC's denial of pre-licensing petition; "[R]elief . . . under § 402(b) requires as a trigger the grant or denial of a license application."). *See also*

Campos v. FCC, 650 F.2d 890, 893 (7th Cir. 1981) ("[I]t is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories.") (citing *FCC v. Columbia Broadcasting System*, 311 U.S. 132 (1940)).

Similarly, the Neighborhood Association's action does not fall within the exclusive jurisdiction of the courts of appeals under the Hobbs Act. The Hobbs Act provides only for review of the FCC's "final orders," and the Fifth Circuit expressly recognized that the FCC has not yet issued a final order in this case. *Bywater*, 879 F.2d at 169. *See also, e.g., West Chicago, Ill. v. NRC*, 701 F.2d 632, 652 n.21 (7th Cir. 1983) (exclusive review provisions of Hobbs Act do not apply to agency action that does not constitute final order). The Hobbs Act simply does not address the appropriate forum for reviewing the FCC's complete failure to comply with its mandatory duties under NHPA and NEPA.

The Fifth Circuit may have recognized that the above special review statutes do not encompass the Neighborhood Association's claim and yet construed those statutes broadly to preclude *any* judicial review of challenges to FCC decisionmaking prior to the agency's issuance of a final licensing decision or other final order. *See Bywater*, 879 F.2d at 169. If so, the Fifth Circuit violated this Court's oft-repeated instruction that, absent clear congressional intent, a jurisdictional statute should not be construed to deny judicial review of agency decisions not

directly covered by the statute. *See, e.g., Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985).[13]

Because the jurisdiction of the district courts to hear actions arising from the FCC's failure to fulfill its non-discretionary duties under NHPA and NEPA is not abrogated by any statutory provision, district courts should retain their customary jurisdiction over such actions.[14]

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[13] The Fifth Circuit's reliance on this Court's decision in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), is misplaced. In that case, this Court held that "litigants may not evade these [exclusive jurisdiction] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *Id.* at 468. The plaintiffs in that case brought an action in the district court to enjoin certain FCC activities as ultra vires instead of challenging an FCC decision concerning those activities in a court of appeals. By contrast, as the Fifth Circuit recognized, here there is no final licensing decision by the FCC from which the Neighborhood Association can appeal. *Bywater*, 879 F.2d at 169. Moreover, the Neighborhood Association is not challenging FCC action that is connected with the outcome of the FCC's eventual licensing decision.

[14] *See* note 8, *supra*. *See generally Leedom v. Kyne*, 358 U.S. 181, 183-85 (1958) (district court had general jurisdiction over action despite statutory review provision where action was not a challenge to a "final order" of the agency); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3943 at 324 (1977) (Absent a specific provision in a special review statute for court of appeals jurisdiction over the action, "the matter must be taken to a district court, ordinarily for injunctive or declaratory relief."); Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. Rev. 765 (1983) ("Agency action that is not of the limited class of actions enumerated in the [special review] statute may be reviewed in the district courts.").

C. District Court Jurisdiction is Appropriate Here Because Review Pursuant to the Special Review Statutes is Inadequate and Inefficient In This Case.

Courts traditionally have considered both the adequacy of judicial review and judicial efficiency when construing the respective jurisdiction of courts of appeals and district courts over challenges to agency action or inaction. *See, e.g., Florida Power and Light Co. v. Lorion,* 470 U.S. 729, 741-42 (1985); *Susquehanna,* 619 F.2d at 240-41; *Izaak Walton League,* 237 F. Supp. at 292-93. Here, those considerations weigh in favor of district court jurisdiction.

First, the Fifth Circuit's confinement of judicial review to the courts of appeals allows irreparable environmental harm to occur before the FCC issues an order triggering appellate review. In this case, Crescent City has been allowed to construct a 200-foot television tower that adversely affects the character of a historic district listed in the National Register of Historic Places. This irreparable injury occurred without notice to interested parties, without consultation with the State Historic Preservation Officer,[15] and without the preparation of an environmental assessment or environmental impact statement.[16]

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[15] The State Historic Preservation Officer is a "key participant" in the process of considering impacts to historic sites. Advisory Council on Historic Preservation, 36 C.F.R. § 800.1(c)(ii) (1988).

[16] The All Writs Act, 28 U.S.C. § 1651 (1982), does not furnish the courts of appeals with a mechanism for protecting the public from this irreparable environmental harm. That Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." Here, a court of appeals could not grant the relief requested in the

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Second, the Fifth Circuit's restriction of jurisdiction to appellate courts undermines interests of judicial economy, and will inevitably result in bifurcated proceedings. Enforcement actions under NHPA and NEPA, brought when an agency has failed to act, generally do not have an existing administrative record on which a court of appeals can base its review, and therefore require fact-finding, which the district courts are better suited to perform. *Susquehanna*, 619 F.2d at 241.[17] Thus, appellate

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complaint – an injunction to prevent Crescent City's pre-licensing construction of the tower before the FCC has complied with NHPA and NEPA. Rather, as the Fifth Circuit acknowledged, under the FCC's "one-step" licensing procedure for microwave television towers, the FCC allows construction (as opposed to operation) of the tower to take place without an "order" over which the court of appeals would have jurisdiction. At most, a court of appeals could protect its jurisdiction to review the FCC's eventual decision to issue an operating license for the tower, which raises issues separate and distinct from the environmental impacts of the tower construction. "The All Writs Act is not an independent grant of jurisdiction to a court; it merely permits a court to issue writs in aid of jurisdiction acquired to grant some other form of relief." *TRAC*, 750 F.2d at 77 (citing *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968)).

[17] *Cf. Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989), *petition for cert. filed sub nom. Tuolumne Park and Recreation District v. ICC*, 58 U.S.L.W. 3336 (Oct. 30, 1989) (No. 89-701). In *Friends of Sierra Railroad*, the Ninth Circuit deferred to the agency's unilateral factual determination that, while the agency had not complied with NHPA, the State Historic Preservation Officer had received notice of the agency action requiring NHPA review and had failed to object to the action within the statutory period. *Id.* at 669. Independent fact-finding by the district court would have revealed that the agency in fact did not provide adequate notice to the State Historic Preservation Officer.

review will necessarily require a remand to the district court or a special master to resolve these factual issues. *See TRAC*, 750 F.2d at 78 (citing *ITT World Communications*, 466 U.S. at 469). The route prescribed by the Fifth Circuit, therefore, would necessarily involve three separate court proceedings: initial review by the court of appeals, a remand to the district court or a special master for fact-finding, and a merits review by the court of appeals. The review urged by the Neighborhood Association, by contrast, could be satisfactorily concluded at the district court level.

Because review in the courts of appeals pursuant to the special review provisions is inadequate and inefficient in this case, the Fifth Circuit erred in holding that the district court lacked jurisdiction to hear the Neighborhood Association's claims.

CONCLUSION

For the foregoing reasons, the National Trust for Historic Preservation in the United States respectfully requests that this Court grant the Bywater Neighborhood Association's petition for a writ of certiorari.

Respectfully submitted,

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February 7, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BYWATER NEIGHBORHOOD ASSOCIATION	*	
	*	
versus	*	
WILLIAM J. TRICARICO, in his capacity as SECRETARY, FEDERAL COMMUNICATIONS COMMISSION and CRESCENT CITY COMMUNICATIONS COMPANY, INC., OF DELAWARE and NOTEL, INC.	*	CIVIL ACTION NO. 88-5086

COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS

By this action plaintiff requests this Honorable Court to declare unlawful the failure and refusal by William J. Tricarico as Secretary, Federal Communications Commission, to require, for the construction of a 195 ft. STL Tower at 620 Desire Street, New Orleans, Louisiana and for a new domestic satellite earth station at 3200 Chartres Street, New Orleans, Louisiana in the Bywater Historic District such consultation with the Advisory Council on Historic Preservation as required by the law and regulations prescribing the duties of that Council, and as required by F.C.C. regulations. Plaintiff further requests that this Court declare unlawful the failure of the Secretary to require an Environmental Assessment for the STL Tower. Plaintiff further prays that this Court preliminarily and permanently enjoin any steps toward construction of this tower (including those which may be taken by

the defendants or those acting in concert with them), until such time as all defendants comply with the requirements of federal law. Plaintiff further requests that this Court order, by ~~manda~~tory injunction, the removal of the domestic satellite earth station until defendants comply with the law and regulations prescribing the duties of that Council, and until the environmental impact of that facility is properly assessed.

2.

Crescent City Communications Company, Inc., of Delaware has applied to the Federal Communications Commission for Authorization in the Auxilliary Radio Broadcast Services to broadcast from a TV Microwave Station STL tower to be constructed to a height above ground of 195 to 200 feet at 620 Desire Street, New Orleans, Louisiana. That location is entirely within the Bywater Historic District, so listed in the National Register of Historic Places by the U.S. Department of the Interior.

3.

NOTEL, Inc. has applied to the Federal Communications Commission for Authorization to install a new domestic satellite earth station at 3200 Chartres Street, New Orleans, Louisiana. That location is also entirely within the Bywater Historic District, so listed in the National Register of Historic Places.

4.

Crescent City Communications, the permittee of Television Station WCCL, Channel 49, is related to NOTEL, Inc., insofar as the majority shareholder, President and director of Crescent City Communications is the President of NOTEL, and a shareholder in the minority corporate shareholder of NOTEL. The facilities of NOTEL and Crescent City that are at issue herein are across the street from each other and are planned to provide different components for broadcasting, receiving and transmitting that will operate in conjunction with each other.

JURISDICTION

5.

This Court has jurisdiction under 28 U.S.C. § 1331 (Federal Question Statute); 5 U.S.C. § 701 *et seq.* (the Administrative Procedure Act); 28 U.S.C. 1361 (the Mandamus and Venue Act of 1962); 28 U.S.C. § 2201 *et seq.* (the Declaratory Judgment Act); 42 U.S.C. § 4321 *et seq.* (the National Environmental Policy Act of 1969); 16 U.S.C. § 470 *et seq.* (the National Historic Preservation Act of 1966); and all regulations promulgated thereunder. The amount in controversy with respect to plaintiff, exclusive of interest and costs, exceeds ten thousand dollars.

PARTIES

6.

Plaintiff Bywater [Neighborhood] Association is a non-profit Louisiana corporation domiciled in Orleans Parish. The plaintiff corporation was organized to

encourage the preservation of the distinctive character of the Bywater Section of the City of New Orleans. Many of plaintiff's members reside and/or own real property in that section and avail themselves of that District's aesthetic, recreational and historic features. Plaintiff and its individual members have objected to the construction of the TV Microwave Station STL Tower and satellite earth station and have expressed their objections to the defendants.

7.

Defendant William J. Tricarico, is the Secretary of the Federal Communications Commission (the "FCC"). Pursuant to 47 U.S.C. 301 et seq., the FCC is responsible for considering applications and granting permits in the auxilliary radio broadcast services and for the installation and operation of the satellite earth station.

8.

Defendant, Crescent City Communications Company, Inc. of Delaware ("Crescent City") is a corporation organized under the laws of the State of Delaware. It is authorized to do business in Louisiana and maintains a registered office in Orleans Parish. Crescent City is the applicant for the Authorization for the TV Microwave STL tower.

9.

Defendant, NOTEL, Inc. ("NOTEL") is a corporation organized under the laws of the State of Louisiana. It is

domiciled in Orleans Parish. NOTEL is the applicant for Authorization for installation and operation [of] the satellite earth station.

HISTORY OF APPLICATIONS

10.

By Application dated February 8, 1988 received by the FCC on February 16, 1988, NOTEL sought authorization to operate a "Domestic KU Band Communications Satellite Receive and Transmit Earth Station in New Orleans, Louisiana." A copy of that application is attached hereto as plaintiff's Exhibit A.

11.

In its application, NOTEL, through Clifford Smith, makes the statement that " . . . the construction and operation of the facilities will not affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology or culture that are listed in the National Register of Historic Places or are eligible for listing."

12.

By application dated June 22, 1988, Crescent City, through its representative advised the FCC of its desire to construct at 620 Desire Street a TV Microwave Station STL tower 195' in height. A copy of that application is attached hereto as plaintiff's Exhibit B. The Application was received by the FCC on July 11, 1988.

13.

As a part of that Application, Crescent City included a "Technical Exhibit" prepared by du Treil, Lundin & Rackley, Inc., of Washington, D.C. That Technical Exhibit is attached hereto as Exhibit C.

14.

In the Application and in the accompanying Technical Exhibit the statement is made that: "The proposed construction appears to be categorically excluded from environmental processing pursuant to Section 1.1306 of the Commission's Rules."

15.

The regulations promulgated by the FCC provide that certain actions are categorically excluded from environmental processing if, among other things, they "do not . . . (I) involve a site location specified under § 1.1307(a)(1)-(5) . . . " 47 CFR § 1.1306 (10-1-87 Edition)[.]

16.

The FCC regulations further provide that "the following types of facilities may significantly affect the environment and thus require the preparation of EA's (Environmental Assessments) by the applicant (see § 1.1308 and 1.1311) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317)[.]

* * *

(3) Facilities that will affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology or culture, that are listed in the National Register of Historic Places or are eligible for listing. (See 36 CFR Parts 60, 63 and 800)

47 CFR § 1.1307

17.

The Bywater Historic District was entered into the National Register of Historic Places on January 23, 1986. The district includes the location at which the TV Microwave Station STL is proposed for construction and at which the satellite earth station has been installed. Photocopies of the National Register designation and map of the Bywater Historic District are attached hereto as plaintiff's Exhibits D and E, and plaintiff has indicated thereon the locations of the Satellite earth station and the proposed STL tower.

18.

On June 30, 1988, and July 11, 1988, Robert Fink, Chief, Western District of Project Review, Advisory Council on Historic Perservation (the "Advisory Council") wrote to the Secretary, FCC regarding the construction of the proposed tower, and reminding him of his obligations under NHPA. A copy of those letters is attached as plaintiff's Exhibit F and G.

19.

In response thereto Mr. Fink received a reply dated July 27, 1988 from Eileen Chaney of the of the [*sic*] Consumer Assistance and Small Business Division, Office of Public Affairs, FCC confirming that "there is a pending application for a TV-STL, File Number BPTS-880711ME, to be located at 620 Desire St." Ms. Chaney indicated further only that she was forwarding Mr. Fink's letter to the FCC Mass Media Bureau, Auxilliary Services. A copy of her letter is attached hereto as plaintiff's Exhibit H.

20.

Mr. Fink wrote again to Ms. Chaney on November 1, 1988, and photocopy of that letter is attached as plaintiff's Exhibit I.

21.

The FCC has taken no steps to evaluate the impact of this project on the Bywater Historic District, to prepare an Environment Assessment (EA) of it, nor to undertake and implement consultation regarding the historic preservation implications of the project with the Advisory Council and State Historic Preservation Officer. The Environmental Impact Statement prepared for the satellite earth station is erroneous in that it concludes that its construction and operation will not affect buildings, sites, etc. listed in the National Register of Historic Places.

22.

For the reasons stated below, the failure by the FCC to consult with the Advisory Council on Historic Preservation and to take such other action required for this project is arbitrary, capricious, in bad faith, abusive of the discretion, unreasonable and in violation of the procedure required by law. Consequently, defendants are without requisite authority to proceed with this project.

23.

The STL tower has not been erected; though a base for it has been installed.

24.

The dishes for the satellite earth station have been installed.

FIRST CAUSE OF ACTION

25.

The National Historic Preservation Act of 1966 ("NHPA"), as amended, 16 U.S.C. § 470, *et seq.*, established the Advisory Council on Historic Preservation (the "Council") as an independent agency of the United States to advise the President and the Congress on historic preservation matters; to recommend measures to coordinate Federal historic preservation activities; and to comment on Federal actions affecting properties included in or eligible for inclusion in the National Register of Historic Places (the "National Register").

26.

Section 106 of the Act, as amended (16 U.S.C. § 470 f) requires that federal agencies with direct or indirect jurisdiction over a federal, federally assisted or federally licensed undertaking afford the Council a reasonable opportunity for comment on such undertakings that affect properties included in or eligible for inclusion in the National Register, prior to the agency's approval of any such undertaking. Federal Regulations have been promulgated to define this process, 36 CFR § 800 et. seq.

27.

In accordance with 36 C.F.R. Part 61.2, the Governor of Louisiana has appointed a State Historic Preservation Officer ("SHPO"), who, in cooperation with federal agency officers, is responsible for administering the Act within this State. Ultimate responsibility for compliance lies with the federal officer.

28.

As implemented in 36 C.F.R. Part 800, the Section 106 process is a public interest process in which the federal agency proposing, funding or licensing an undertaking, the SHPO and the Council and interested organizations and individuals participate. The process is designed to assure that alternatives to avoid or mitigate an adverse effect on a National Register property are adequately considered in the planning process. The regulations are binding on all federal agencies and specify the manner in which the Council will render its comments to federal

agencies when their undertakings affect properties included in or eligible for inclusion in the National Register. (See *Federal Register,* Volume 44, p. 6068 et seq.)[.]

29.

It is the duty of the responsible federal officer (herein defendant Tricarico), in conjunction with the SHPO, to develop an adequate record for review by the Advisory Council.

30.

The Domestic Satellite Earth Station and TV Microwave STL tower are projects licensed by the FCC. As a result, defendant Tricarico is subject to the provisions of the National Historic Preservation Act and Regulations promulgated in connection therewith.

31.

Defendant Tricarico made no effort to investigate thoroughly and in good faith the project's likely impact on historically and culturally significant properties in the vicinity of the project, in violation of the Act and of Part 800 of Title 36 of the Code of Federal Regulations. Those properties consist of the Bywater National Historic District.

SECOND CAUSE OF ACTION

32.

The National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*) provides, *inter alia,* that it is the

continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal functions and resources to the end that the Nation may

A. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

B. Assure for all Americans esthetically and culturally pleasing surroundings; and

C. Preserve important historic, cultural, and natural aspects of our national heritage (42 U.S.C. § 4331 (b)).

33.

The FCC has not taken into consideration the environmental amenities and values pertinent to this activity. Indeed, the FCC has failed to observe that any National Register sites are affected by the facilities described in the Application.

34.

The National Environmental Policy Act ("NEPA") further required the FCC to assess the probable impact of the project on the human environment.

35.

If the project constitutes a major federal action, Section 102(2) (C) of NEPA (42 U.S.C. § 4332(2) (C)) obliged

the FCC to prepare an Environmental Impact Statement (EIS) for the project prior to issuing a permit.

36.

No EA has been prepared for the STL tower by the FCC, and the "Environmental Impact Statement" for the satellite earth station is wrong on its face.

37.

Furthermore, the FCC did not follow its own Regulations governing assessment of environmental impacts. 47 CFR § 1.1307[.]

38.

The Administrative Record for the STL tower contains no "Environmental Assessment".

THREAT OF IMMEDIATE, IRREPARABLE INJURY

39.

FCC has authorized the construction and installation of both the Domestic Satellite Earth Station and TV Microwave STL tower. The FCC contemplates no further action or scrutiny of this project prior to the construction of the tower.

40.

The STL tower is scheduled for construction and operation and that construction is imminent.

WHEREFORE, plaintiff prays:

I. That the Court render a declaratory judgment decreeing: That Secretary, William J. Tricarico, in his official capacity as Secretary of the Federal Communications Commission[,] has failed to comply with the provisions of the National Historic Preservation Act; and the National Environmental Policy Act, and all FCC and Advisory Council regulations promulgated thereunder;

II. That this Court issue a Temporary Restraining Order and Preliminary Injunction, with nominal bond, and in due course a Permanent Injunction, enjoining the FCC and Crescent City Communications Company, Inc. of Delaware, their officers, agents, employees, servants, contractors, attorneys, and all others in active concert with them from:

> The construction and operation of the TV Microwave STL tower at 620 Desire Street, New Orleans, Louisiana;

III. That this Court issue a Preliminary Mandatory Injunction and in due course a Permanent Mandatory Injunction enjoining the FCC and NOTEL, Inc., their officers, agents, servants, contractors, attorneys and all others in active[ ] concert with them, ordering them to remove the domestic satellite earth station at 3200 Chartres Street, New Orleans, Louisiana.

IV. That this Court award plaintiff its attorney's fees, expert witness fees, court costs and incidental expenses.

V. All other legal and equitable relief.

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No. 89-898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BYWATER NEIGHBORHOOD ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1989

No. 89-898

BYWATER NEIGHBORHOOD ASSOCIATION,
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Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

The federal respondents offer a highly formalistic interpretation of the relevant statutes in urging this Court not to address the two troubling jurisdictional questions raised by the Fifth Circuit's decision — namely, which court has jurisdiction to review petitioner Bywater Neighborhood Association's claims, and when may petitioner obtain judicial review. We first reply to the respondents' argument that the Neighborhood Association's claims under the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, are necessarily consigned to the United States Court of Appeals for the District of Columbia Circuit by the exclusive review provision of the Communications Act of 1934, 47 U.S.C. § 402(b). Although respondents ignore the question of the timing of review, we then explain why the Fifth Circuit's ruling that review is barred until after the Federal

Communications Commission ("FCC") issues a final licensing order — after the offending tower has been erected — threatens the policy objectives of NHPA and NEPA, and highlights the need for review by this Court.

Before addressing these points, however, it is important to set the record straight on the scope of the FCC's authority over the construction of the broadcast tower at issue in this proceeding. Respondents argue that the FCC has no authority over the construction of the tower, and hence it is powerless to act under NEPA and NHPA until it reviews the application for an operating license. Opposition ("Opp.") at 8-9.

That is not the case. Section 319(a) of the Communications Act provides that the FCC may not issue an operating license "unless a permit for construction has been granted by the Commission." 47 U.S.C. § 319(a). While petitioner does not challenge the FCC's discretion to engage in one-step licensing generally, *see id.* at § 319(d), petitioner has consistently argued that, through its one-step licensing procedures, the FCC has abdicated its duties under NEPA and section 106 of NHPA by failing to consider the impact that construction of the tower will have on the Bywater Historic District until after the tower is built. *See Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 464 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *see also* 47 C.F.R. § 1.1312 (1988)(FCC's regulations requiring the agency to consider the impact of construction under NEPA and NHPA even where the agency is using its one-step licensing procedures). Accordingly, there can be no doubt that the FCC has the authority to address petitioner's objections to the construction of the tower now.

A. The Proper Court

There are at least three flaws in respondents' argument that the D.C. Circuit has exclusive jurisdiction

over the Neighborhood Association's claim: (1) it misapprehends the scope and purpose of 47 U.S.C. § 402(b); (2) it is flatly at odds with the Third Circuit's decision in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (1980), *cert. denied*, 449 U.S. 1096 (1981); and (3) it disregards the teachings of this Court's decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985).

1. Respondents significantly overstate the sweep of 47 U.S.C. § 402(b), which vests exclusive jurisdiction in the D.C. Circuit to review FCC "decisions and orders" regarding applications for "construction" and "station license[s]." Reading § 402(b) far more broadly than its language suggests, respondents argue that § 402(b) relegates petitioner to pursuing its claims under NHPA and NEPA before the D.C. Circuit, because petitioner's claims arose in the context of an FCC licensing proceeding. Opp. at 9.

The most glaring problem with respondents' analysis is that it ignores both the language of and purposes underlying § 402(b). Contrary to respondents' contention, the Neighborhood Association did not challenge any licensing "decision" or "order" by the FCC; indeed no FCC decision has been issued in this matter. The Neighborhood Association's complaint, which is reproduced as an appendix to the brief of *amicus curiae* National Trust for Historic Preservation in the United States, challenged only the FCC's failure to comply with its nondiscretionary duties under NHPA and NEPA to assess the impact the broadcast tower would have on the Bywater Historic District before permitting construction to proceed. These claims do not arise under the Communications Act, and may proceed independently of FCC action on the pending application for an operating license. *Cf. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 239-42 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Respondents' argument also cannot be squared with the purposes underlying § 402(b). Congress enacted § 402(b) to ensure that all cases involving FCC construction and licensing orders are referred to a single court — both to foster expertise within the court on the highly technical issues that often lie at the core of FCC licensing decisions, and to ensure uniformity in judicial review of FCC orders. *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942). This case raises no broadcast issues within the compass of the Communications Act, nor does its resolution require the special expertise of the D.C. Circuit in communications matters.

Nonetheless, under respondents' theory, instead of filing a complaint in the district court, where the parties reside and the damage is taking place — as is typical in NHPA and NEPA proceedings — the Neighborhood Association should have filed a petition for mandamus in the D.C. Circuit, relying on *Telecommunications Research & Action Center v. FCC ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984). *See* Opp. at 11. Petitioners would then have had to seek emergency relief from the court of appeals to block further construction of the tower. At that point, however, no administrative record would be available for review, and the court of appeals would plainly not be suited to conduct the fact-finding required in NHPA and NEPA cases.[1] Hence, the appeals court would have had little choice but to refer the proceeding to a special master, a district judge, or perhaps even the agency, to assemble a record. Once that task was completed, the appeals court would then have had to review the record on the merits and render a decision.

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[1] Both NEPA and NHPA cases are often fact-intensive. In NHPA cases, for example, there are typically disputes over the impact the proposed action will have on the historical resources, and whether the agency has adequately consulted with local officials. *See Friends of Sierra R.R. v. ICC*, 881 F.2d 663 (9th Cir. 1989), petition for cert. pending *sub nom. Tuolomne Park & Recreation Dist. v. ICC*, No. 89-701.

TRAC, 750 F.2d at 78. At a minimum, respondents' theory condemns the D.C. Circuit to squander the resources of three circuit judges in supervising environmental, historical preservation, and any other litigation that conceivably relates to FCC decisions, even though the case neither raises a claim under the Communications Act nor challenges an "order" or "decision" within the meaning of § 402(b).

2. Respondents recognize that their jurisdictional theory, and that adopted by the Fifth Circuit in this case, cannot readily be reconciled with that developed by the Third Circuit in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (1980), *cert. denied*, 449 U.S. 1096 (1981). Nonetheless, respondents contend that *Susquehanna* does not "present a square conflict" with the ruling here (Opp. at 13), and, in any event, the Seventh Circuit in *Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193, 1196 (1983), *cert. denied*, 466 U.S. 926 (1984), has read *Susquehanna* to limit its reach. Opp. at 14. Respondents are wrong on both counts.

To begin with, respondents' effort to distinguish *Susquehanna* is unavailing. Pointing to the fact that in *Susquehanna* the Nuclear Regulatory Commission had "informally authoriz[ed]" the discharge of contaminated water (Opp. at 13), while here petitioner is challenging the FCC's failure to take action, respondents argue that the facts in *Susquehanna* present "a more colorable justification for judicial intervention than is presented here." *Id.* But respondents' argument is irrelevant on question of whether review may be had in the district court, the issue on which the Third and Fifth Circuits are in irreconcilable conflict. Moreover, the FCC's one-step licensing regulations have given broadcasters at least as much of an authorization to proceed with construction as the NRC's "informal authorization" in *Susquehanna*, and hence even that semantic distinction fails. Finally, respondents' purported distinction is meaningless, since

it is by now settled doctrine that an agency's failure to act may be properly challenged under the Administrative Procedure Act in precisely the same way final agency action may be challenged. *See* 5 U.S.C. §§ 555(b) & 706(1); *see also TRAC*, 750 F.2d at 76-77, 79; *Cutler v. Hayes*, 818 F.2d 879, 894-99 (D.C. Cir. 1987) and cases cited therein.

Respondents' fall-back suggestion, that the Seventh Circuit's decision in *Denberg* limits the reach of *Susquehanna*, and thereby lessens the deleterious impact of the conflict among the Circuits, is also in error. In *Denberg*, the Seventh Circuit cited *Susquehanna* approvingly, noting that, where "the administrative proceeding is informal and the record of the proceeding has to be reconstructed in the judicial review proceeding before judicial review proper can begin," that "would be a case of 'inadequacy' of the special review proceeding" justifying resort to the district court. *Denberg*, 696 F.2d at 1196 (citing 5 U.S.C. § 703). If that is a limitation, it is not one that helps respondents. As this case and *Susquehanna* exemplify, NEPA and NHPA cases will often arise where "the administrative proceeding is informal" and the courts will have to construct a record before judicial review can begin. Far from supporting respondents, *Denberg* further underscores the division among the Circuits on this critical jurisdictional issue.[2]

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[2] This case, like *Susquehanna*, plainly falls within the exception recognized in *Denberg* that district court review must be available where special review statutes afford an inadequate remedy. However, we do not disagree with the general rule recognized in those cases that where an agency actually considers NEPA and NHPA claims in the course of licensing proceedings, then the agency's final action would be subject to challenge using the special review statutes. Thus, for instance, under the FCC's former two-tier licensing system, the Neighborhood Association would have made its objections known to the FCC during the FCC's deliberation on whether to grant Crescent Communication a

footnote continued

3. Although respondents cite *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), they seem to have missed its point. Respondents cite *Florida Power & Light* for the unexceptional proposition that once Congress has created an exclusive statutory review system, "the federal district courts lack jurisdiction over licensing matters." Opp. at 10. But by using open-ended terms like "licensing matters" and avoiding the precise language of § 402(b), respondents never grapple with the question presented here, namely, whether the FCC's failure to comply with the NHPA and NEPA constitutes an "order" or "decision" over which the D.C. Circuit has exclusive jurisdiction.

Florida Power & Light suggests that it does not. There, the Court took a highly pragmatic approach in deciding whether a ruling by the Nuclear Regulatory Commission, denying a citizen request to withdraw the operating license of a local power plant, was reviewable in the district court or in the court of appeals. After carefully examining the questions of judicial economy and the adequacy of judicial review, the Court concluded that the court of appeals was the appropriate forum.

Here, those considerations counsel strongly against the position urged by respondents. Respondents' approach would funnel all NHPA and NEPA claims directly to the D.C. Circuit — without regard to whether

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construction license. If the FCC had granted a license over the Neighborhood Association's objection, then the Association would have been limited to challenging that ruling in the D.C. Circuit. There is good reason for this asymmetry. In that situation, there would be a final FCC "order" for the court to review, there would be a fully developed record on the NEPA and NHPA claims, which would allow for orderly appellate review, and there might be a number of other challenges to the FCC's action, some of which are likely to raise questions under the Communications Act. In contrast, here, not only is each of those factors absent, but there is ongoing irreparable injury that can only be remedied by immediate judicial intervention which the district courts are best equipped to provide. *See* 5 U.S.C. § 703.

the challenged agency action falls within the purview of § 402(b) or whether appellate review serves the interests of judicial economy. As this case illustrates, however, that approach would require the D.C. Circuit to establish procedures for handling emergency requests for injunctions and appointing masters or district judges to engage in fact-finding. That would hardly be a sensible way to allocate scarce judicial resources. Accordingly, petitioner submits that respondents' theory, and that adopted by the court below, cannot be squared with the approach that this Court took in *Florida Power & Light*, and hence this Court's review is warranted.

B. The Proper Timing For Review.

Remarkably, respondents are entirely silent on the Fifth Circuit's other ruling, namely that the Neighborhood Association is foreclosed from seeking review of its NHPA and NEPA claims until the FCC issues a final order. Indeed, respondents do not even address the impact that this holding will have on the effective enforcement of NHPA and NEPA. Nor do respondents contest that, under the ruling below, the irreparable harm that petitioner is seeking to avert — the construction of a 200 foot high broadcast tower in an historic district — will occur well before the Neighborhood Association can seek judicial review, let alone secure a ruling on the merits. Nor can it be doubted that by the time petitioner can bring its claims, the practical fact is that the FCC will be reluctant to require the removal of the completed tower. *See Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989). Inevitably, after-the-fact "compliance" with NEPA and NHPA will do little to inform agency decision making, much less protect the public from harm to the environment or to its cultural and historic resources.

As we emphasized in our petition, the jurisdictional path laid down by the Fifth Circuit virtually guarantees the subversion of the important federal interests sought

to be protected by NHPA and NEPA. In an effort to blunt the harshness of this rule, respondents suggest that "[t]he dispute over the construction of the tower is for the local authorities, not the FCC." Opp. at 9. However, the suggestion that the FCC has *no* authority over the construction of the tower is contradicted by 47 U.S.C. § 319(a), which sets out the general rule that the FCC may not issue an operating license "unless a permit for construction has been granted by the Commission." While the FCC has elected to dispense with the requirement of a separate construction permit, *see id.* at § 319(d), it may not dispense with congressionally mandated environmental review laws by shifting its responsibility onto local zoning authorities.

Congress has made the judgment that it is essential to have a federal system of environmental and historical preservation, enforceable in federal courts, and that these important national interests should not be entrusted to the often parochial interests of local authorities. The enactment of NHPA and NEPA reflects a strong national commitment to the protection of our environment and heritage, yet the ruling below threatens to turn these mandates into toothless tigers.

CONCLUSION

For the reasons stated above and in the petition for certiorari, the Court should review the judgment entered by the Fifth Circuit in this case.

Respectfully submitted,

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